THE RISE OF NATIONALISM IN INTERNATIONAL FINANCE: THE PERENNIAL LURE OF POPULISM IN INTERNATIONAL FINANCIAL RELATIONS

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Populism and nationalism are key drivers of current international economic relations, affecting almost all aspects of foreign economic policy. After almost four decades of cooperation in international financial relations, recent events suggest that we are now potentially entering a new phase of progressive disengagement. This new era would be dominated by the explicit need to safeguard domestic interests, in which regulatory barriers to cross-border finance will be more pronounced and curtailing the expansion of global financial markets will no longer be considered a policy taboo. This Article presents a brief history of financial nationalism and discusses some of its more recent phenomena around the world, from the regulatory conflicts between the European Union and the United Kingdom over the control of the European derivatives clearing market, to the attacks on central banks' independence, or the open distrust of western regulators against the Chinese FinTech giants. In contrast to other phenomena of economic populism, like trade protectionism, it is very difficult to theorize a single explanation behind this new protectionist push. Financial nationalism is neither an economic ideology nor a structured response to the downsides of economic globalization. More simply, it is the manifestation of a multiplicity of policy needs, which invariably lead to a reconfiguration of the inherent regulatory tradeoff between the protection of national sovereignty and the expansion of global markets; this time favoring the former.

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I. INTRODUCTION

Nationalism is a key concept in contemporary international relations. After decades during which nationalism nearly disappeared from the vocabulary of mainstream western politics and was instead used only by a small fringe of extreme parties and a handful of populist dictators, it has now reoccupied the central stage of the political debate. The United Kingdom's decision to leave the European Union, U.S. President Donald Trump's immigration and protectionist trade policies, the rise of anti-Euro political parties in continental Europe, China's confrontational maritime policy in the South China Sea, and Brazil's 2018 turbulent elections, can all be explained by a sincere desire to reinstate national interest as the guiding principle of domestic and foreign economic policy. While nationalism is mostly associated with border and ethnic wars, an isolationist foreign policy, or tougher immigration controls, it nonetheless plays a fundamental role in international economic relations.[1] In this context, most of the discussion on economic nationalism focuses on trade policy, where barriers to trade are more visibly disruptive.[2] On the contrary, very little has been written so far

1. *See generally* Erns B. Haas, *What is Nationalism and Why Should We Study it?*, 40 INT'L ORG. 707 (1986) (discussing various conceptions of nationalism).
2. *See*, *e.g.*, Dani Rodrik, *Is Populism Necessarily Bad Economics?*, 108 AEA PAPERS & PROC.

on the recent rise of populism and nationalism in international finance.[3] The goal of this Article is to investigate this phenomenon.

Over the last fifty years, financial integration has progressed at a steady pace, spurred on by the 1970s shift towards a flexible exchange rate regime, the increased need of cheap sources of capital, the desire for better investment opportunities, and financial innovations.[4] Since the creation of the Basel Committee on Banking Supervision in 1975, the process of financial integration has been accompanied by a progressive, albeit slow and patchy, trend towards increased regulatory and supervisory cooperation.[5] The work of the various transnational regulatory networks (TRNs) in finance never reached the level of legal cooperation seen in other areas of international economic policy, notably because of the lack of a hard legal framework. Nonetheless, it worked to create an institutional architecture for finance that at least strived for increased international convergence.[6] Indeed, despite the inherent weakness of the soft international law of finance, institutional, and market pressures on regulators were such that a minimum level of international coordination was often the only option for a country with an open financial system.[7] Not surprisingly, the period between 1975 and 2014 saw a steady increase in international standards and guidelines in virtually all aspects of financial policymaking, from anti-money laundering to banking supervision, derivatives trading, financial inclusion, and even cryptocurrencies.[8]

196, 196–97 (2018) ("[I]n economics, populists reject restraints on the conduct of economic policy. Autonomous regulatory agencies, independent central banks, and external constraints (such as global trade rules) narrow their policy options and hence need to be overcome."); Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. & POL'Y 12, 13–14 (2018).

3. Recent publications since 2016 include Charles Goodhart & Rosa Lastra, *Populism and Central Bank Independence*, 29 OPEN ECON. REV. 49 (2018); Rodrik, *Populism and the Economics of Globalization*, *supra* note 2.

4. Int'l Monetary Fund [IMF], *Understanding Financial Interconnectedness* (Oct. 2010), https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Understanding-Financial-Interconnectedness-PP4503. *See also* RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE 7–9 (2007) (discussing liberalized capital flows during the 1970s and the effect of the flexible exchange rate regime and other financial innovations on financial internationalization). For a broader history of financial globalization, see BARRY EICHENGREEN, GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM 6–43 (2d ed. 2008).

5. On the rise of international cooperation in financial regulation, see CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM (2d ed. 2015).

6. *See generally* FEDERICO LUPO-PASINI, THE LOGIC OF FINANCIAL NATIONALISM: THE CHALLENGES OF COOPERATION AND THE ROLE OF INTERNATIONAL LAW (2017) (discussing the successes and failures of various international law regimes in protecting financial sovereignty).

7. *See* BRUMMER, *supra* note 5, at 115–77. For a more formal explanation of the pressure for cooperation, see generally DAVID ANDREW SINGER, REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM (2007).

8. For a list of all standards and guidelines in finance, see *Key Standards for Sound Financial*

Yet recent events suggest an opposite trend in global financial policymaking towards a more nationalist approach and less regulatory coordination. First of all, since 2010, there has been increasing evidence of a slowdown in the level and pace of financial integration, especially in cross-border banking.[9] Recent research suggests that we are progressively moving from a very integrated global financial system towards a system of *regional* financial integration in which the perimeters of international markets are sensibly reduced.[10] This regulatory trend is the focus of this study.

Just to mention a few key developments: since 2016, the United States, the European Union, and the United Kingdom have been entrenched in parallel regulatory wars on the regulation of derivatives clearing and the reform of Basel III.[11] Various jurisdictions around the world have openly moved to a mode of cross-border banking supervision based on subsidiarization and ring-fencing that substantially reduces financial integration.[12] In various jurisdictions, a new wave of digital protectionism directly affects the expansion and global operation of FinTech firms, banks, and financial institutions.[13] In the United States, the extraterritorial application of U.S. financial laws is increasingly used as an instrument of lawfare to advance broader foreign policy objectives. Finally, central banks are increasingly attacked in various countries by politicians for not

Systems, Fin. Stability Bd., http://www.fsb.org/what-we-do/about-the-compendium-of-standards/key_standards/ (last visited Sept. 27, 2019).

9. *See* Stjin Claessens & Neeltje van Horen, *The Impact of the Global Financial Crisis on Banking Globalization*, 63 IMF ECON. REV. 868, 870–72 (2015) (discussing the evolution of financial globalization after the global financial crisis, noting a well-documented "collapse in capital flows and signs of financial fragmentation"); Sebastian Mallaby, *Globalization Resets: The Retrenchment in Cross-Border Capital Flows and Trade May Be Less Dire than it Seems*, 53 FIN. & DEV. 6, 7 (2016); Roland Beck et al., *The Side Effects of National Financial Sector Policies: Framing the Debate on Financial Protectionism*, 9 EUROPEAN CENTRAL BANK [ECB], (Occasional Paper No. 166, 2015); Eugenio Cerutti & Haonan Zhou, *The Global Banking Network in the Aftermath of the Crisis: Is There Evidence of De-Globalization?* 35–36 (IMF, Working Paper WP/17/232, 2017); Robert McCauley et al., *Financial Deglobalisation in Banking*? 1 (Bank for Int'l Settlements, Working Paper No. 650, 2017).

10. Eugenio Cerutti & Haonan Zhou, *The Global Banking Network: What is Behind the Increasing Regionalization Trend?* 37–39 (IMF, Working Paper WP/18/46, 2018).

11. Caroline Binham & Emma Dunkley, *Basel Postpones Bank Reform Vote Amid Policy Differences*, FIN. TIMES (Jan. 3, 2017), https://www.ft.com/content/589f1ce0-d1a1-11e6-9341-7393bb2e1b51.

12. Wilson Ervin, *Understanding 'Ring-Fencing' and How it Could Make Banking Riskier*, BROOKINGS (Feb. 7, 2018), https://www.brookings.edu/research/understanding-ring-fencing-and-how-it-could-make-banking-riskier.

13. *See*, *e.g.*, *Trump's Trade War Scores Hat-Trick, Affecting Incumbents, Fintechs and Crypto!*, FINTECH TIMES, (May 10, 2019), https://thefintechtimes.com/trade-incumbents-fintechs (discussing FinTech in the United States); Yuan Yang, *Trade War with US Delays China's Rules Curbing Data Transfers*, FIN. TIMES (Apr. 21, 2019), https://www.ft.com/content/c8f4b066-60df-11e9-b285-3acd5d43599e (discussing FinTech in China).

submitting to their political and economic agenda.[14]

All these events clearly signal a change in the attitude of governments towards less global financial cooperation and more national control. It is too early to gauge the real extent of this trend, whether it is merely a temporary phenomenon due to external political events or a more substantial shift towards de-globalization. This study will investigate the rise of financial nationalism in contemporary international financial policy and analyze the reasons behind this phenomenon. This Article will demonstrate that the recent nationalist trend is, in large part, not the result of mere populist rhetoric, but, rather, the consequence of global political economy dynamics favoring different distributional trade-offs. To clarify this argument, this Article will be structured as follows: Part II will introduce the main theories of nationalism and economic populism, with a specific focus on financial populism. Part III will give a brief historical overview of financial nationalism over the last five centuries. Parts IV and V will discuss the recent examples of financial nationalism and attempt to contextualize them within the political economy and political science literature on international cooperation.

II. THEORIES OF NATIONALISM

Nationalism is a well-discussed phenomenon in political science literature.[15] Without delving into the huge amount of work on the topic, nationalism broadly refers to the idea that the interests of the state and the entities or individuals associated with it, be those corporations, citizens, or public agencies, should prevail over those of foreigners. As such, nationalism is a relational concept that requires international context where states must live and operate alongside each other. In this light, it is important to distinguish nationalism from patriotism. Both are relational concepts that entail a competition between two identical interests and the sacrifice of one of them. However, while the former envisages a trade-off between national

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14. *The Independence of Central Banks is Under Threat from Politics*, ECONOMIST (Apr. 13, 2019), https://www.economist.com/leaders/2019/04/13/the-independence-of-central-banks-is-under-threat-from-politics.

15. For an overview of the literature, see generally BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (3rd ed. 2006); ERNEST GELLNER, NATIONS AND NATIONALISM (1983); DUDLEY SEERS, THE POLITICAL ECONOMY OF NATIONALISM (1983); ANTHONY D. S. SMITH, NATIONALISM IN THE TWENTIETH CENTURY (1979); ECONOMIC NATIONALISM IN A GLOBALIZING WORLD (Eric Helleiner & Andreas Pickel eds., 2005); George T. Crane, *Economic Nationalism: Bringing the Nation Back In*, 27 MILLENNIUM J. INT'L STUD. 55 (1998); Anthony A.P. D'Costa, *Economic Nationalism in Motion: Steel, Auto, and Software Industries in India*, 16 REV. INT'L POL. ECON. 620 (2009); Haas, *supra* note 1, at 2; Adam Harmes, *The Rise of Neoliberal Nationalism*, 19 REV. INT'L POL. ECON. 59 (2012); Stephen Shulman, *National Sources of International Economic Integration*, 44 INT'L STUD. Q. 365 (2000).

and foreign interests and the primacy of the nationals', the latter sees a competition between the interests of the individual and those of the state, and the sacrifice of the individuals' interests for the general good of the nation.[16]

Nationalism can express itself in many ways. The most visible forms can include intolerance or violence against foreign individuals and migrants[17] or an aggressive military policy to protect or conquer foreign territories considered as belonging culturally, ethnically, or geographically to the state.[18] But nationalism can also express itself through the subtler disregard of international legal obligations—for instance, the unwillingness to comply with an international court's ruling or strategic violations of key international legal obligations.[19] Nationalism can also manifest itself in economic relations.

A. Economic Nationalism in Political Science

Economic nationalism is part of the broader area of international relations. In this context, economic nationalism is best understood as a general policy attitude giving prevalence to national goals whenever these are in conflict with international objectives and promoting the autonomy and unity of a nation from an economic and financial viewpoint.[20] In a very famous definition, Robert Gilpin described it as the "central idea . . . that economic activities are and should be subordinate to the goal of state building and the interests of the state."[21]

It is easy to equate economic nationalism with economic populism. The two political approaches often go hand-in-hand, as the populist rhetoric oftentimes implies a general aversion to "the enemies of the people," be they financial elites, foreigners, or minorities. We had many examples of this kind

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16. Ben Clift & Cornelia Woll, *Economic Patriotism: Reinventing Control Over Open Markets*, 19 J. EUR. PUB. POL'Y 307, 308 (2012).

17. David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 630 (2006); Chaim Gans, *Nationalism and Immigration*, 1 ETHICAL THEORY & MORAL PRAC. 159, 169 (1998); Claudia Postelnicescu, *Europe's New Identity: The Refugee Crisis and the Rise of Nationalism*, 12 EUR. J. PSYCH. 203, 203 (2016).

18. On the relationship between nationalism and war, see BROWN ET AL., NATIONALISM AND ETHNIC CONFLICT (rev. ed., 2001). *See generally* JOHN HUTCHINSON, NATIONALISM AND WAR (2017).

19. The quintessential example in this regard is China's refusal to comply with the international law of the sea with regard to its claims on the South China Sea. *See* Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1 (2006); Harriet Moynihan, *China's Evolving Approach to International Dispute Settlement*, CHATAM HOUSE (Mar. 29, 2017), https://www.chathamhouse.org/publication/chinas-evolving-approach-international-dispute-settlement (discussing China's ambiguous attitude towards international dispute settlement and how it relates to Chinese nationalism).

20. Shulman, *supra* note 15, at 368.

21. ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 31 (1987).

throughout history. With the exception of Chile under Pinochet, most Latin American countries, from the 1930s well into the 1980s, adopted very strict controls on foreign direct and portfolio investments and limited their international economic engagement.[22] The Calvo doctrine prevented foreign investors from seeking legal remedies outside national courts, thus giving host states the upper hand in investment disputes.[23]

Historically, economic nationalism manifested itself in trade policy through the adoption of import-substituting industrial policies and higher trade barriers.[24] Protectionism is a trade phenomenon and a trade policy concept, although it sometimes refers to other non-strictly-trade policies. It defines the practice of restricting imports from other countries in order to protect domestic industries.[25] This is achieved by various methods, from increased import duties or quotas to restrictive and discriminatory domestic regulations, subsidies for local firms, and discriminatory administrative practices. The ultimate goal is to protect local industries from the competition of foreign firms, often giving rise to trade wars. More recently, in the international trade arena, the rise of protectionist policies in the form of higher tariff barriers was justified by President Trump as the need to protect the local manufacturing industry.[26] Studies suggest that this trend in international economic policy will not reverse anytime soon, as it reflects a deeper malaise of economic globalization that has been unable to effectively price the trade adjustment costs associated with free trade. In the background, there is also a looming long-term economic shift in the leadership of technology development between the United States and China.

In its worse form, economic nationalism sees the full rejection of globalization and a total reduction of the perimeter of the market at the

22. *See* CAPITAL FLOWS, CAPITAL CONTROLS, AND CURRENCY CRISES: LATIN AMERICA IN THE 1990S 1 (Felipe Larrain ed., 2000) (stating that Latin American experienced "a decade of almost complete financial isolation from world private markets" in the 1980s); Sebastian Edwards, *Capital Flows, Real Exchange Rates, and Capital Controls: Some Latin American Experiences* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 6800, 1998) (stating that "[d]uring the 1960s and early 1970s Latin America was basically cut off from international financial markets").

23. The Calvo Doctrine argues that jurisdiction to settle disputes between foreign investors and host states lies in the place where the investment is located. Thus, the doctrine proposed to deny foreign investors the right to sue the host state in their own national courts or international tribunals. Patrick Juillard, *Calvo Doctrine/Calvo Clause*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010).

24. Robert Baldwin, *The Political Economy of Protectionism*, *in* IMPORT COMPETITION AND RESPONSE 263, 263–92 (Jagdish Bhagwati ed., 1982).

25. *Id.*

26. Douglas Irwin, *The False Promise of Protectionism: Why Trump's Trade Policy Could Backfire*, 96 FOREIGN AFF. 45 (2017); Deborah Elms & Bhargav Sriganesh*, Trump's Trade Policy: Discerning Between Rhetoric and Reality*, 12 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 247, 249 (2017).

national level. This often results in the adoption of a number of policies, which can include widespread nationalizations and the creation of state monopolies, repatriation of foreign staff, violation of foreign-owned intellectual property rights, import-substituting industrial policies, self-sufficient agricultural policies, and a general closure of the capital account.[27] Examples in this regard unfortunately abound, from the nationalizations of foreign investments under Hugo Chavez in Venezuela to the creation of strong state monopolies and the concentration of key industries in national hands in Putin's Russia as a reaction to the post-Soviet liberalizations in the 1990s.[28]

Most of the time, economic nationalism entails a retrenchment of the state along national lines. However, economic nationalism does not necessarily equate to full economic autarchy. More often, it is simply opposed to allowing global markets to exclusively determine the economic destiny of the nation.[29] Sometimes economic nationalist politicians will champion a national version of liberal or neoliberal policies that nonetheless entails the protection of national interests.[30] Thus, even though decision makers identify themselves as liberals, with all that this label carries in terms of market liberalization, state intervention in the economy, and rule of law, they nonetheless favor economic policies that protect the respect of national identities or national autonomy, or that promote the nation, its citizens, and its firms as a sovereign community.[31] For instance, politicians might favor mergers between national firms, rather than allowing a foreign take-over. In other circumstances, they might subsidize the international expansion of national companies or adopt policies that are specifically aimed at distorting markets to incentivize exports. They might favor a foreign direct investment model based on joint ventures with locals, rather than full liberalization with

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27. NIGEL HARRIS, NATIONAL LIBERATION 348 (1990).

28. Rawi Abdelal, *Nationalism and International Political Economy in Eurasia*, *in* ECONOMIC NATIONALISM IN A GLOBALIZING WORLD 21–43 (Eric Helleiner & Andreas Pickel eds., 2005). *See generally* RAWI ABDELAL, NATIONAL PURPOSE IN THE WORLD ECONOMY: POST-SOVIET STATES IN COMPARATIVE PERSPECTIVE (2001) (discussing the role of nationalism in post-Soviet international economic strategies).

29. Sam Pryke, *Economic Nationalism: Theory, History, and Prospects*, 3 GLOBAL POL'Y 281, 285 (2012).

30. For further discussion, see generally ECONOMIC NATIONALISM IN A GLOBALIZING WORLD, *supra* note 15; Harmes, *supra* note 15; Rodrik, *Is Populism Necessarily Bad Economics?*, *supra* note 2; Rodrik, *Populism and the Economics of Globalization*, *supra* note 2. On financial patriotism, see Glenn Morgan, *Supporting the City: Economic Patriotism in Financial Markets*, 19 J. EUR. PUB. POL'Y 373 (2012).

31. *See*, *e.g.*, Juliet Johnson & Andrew Barnes, *Financial Nationalism and Its International Enablers: The Hungarian Experience*, 22 REV. INT'L POL. ECON. 538 (2015) (discussing Hungary's recent use of liberal economics to further national autonomy).

the hope to extract as much benefit as possible for the development of the local economy. None of those policies is based on the refusal of free trade, but quite the opposite: they embrace the opportunities of global markets for pure national gain.[32]

B. Financial Nationalism in a Nutshell

Financial nationalism is the manifestation of this same protectionist approach in the financial and monetary policy spheres. However, it takes a very different form than pure trade barriers. From a political economy perspective, a country has no political incentive to liberalize trade, unless its market access concessions are reciprocated by other countries.[33] Indeed, unilateral trade liberalization increases pressure on domestic industries, but without the export gains that make the overall deal appealing. In finance, on the contrary, unilateral liberalization is always an optimal policy, as reduced controls will pull capital from other countries.[34] Thus, while trade protectionism plays a role in the context of reciprocal market access concessions, by drawing a clear line between the import-competing industries in favor of protection and the domestic consumer and export interest groups in favor of liberalization, the same does not apply to trade in capital. In finance, the dividing line between legitimate policies and economically unjustified protectionist interventions or discrimination is blurry, as there is no need to protect domestic money over foreign money. Global finance is less interested in the reciprocal market access dynamics and much more focused on controlling and managing cross-border financial flows. In this context, the objective of financial nationalism is mostly to insulate the country from the bargaining and political power given to foreign investors, international organizations, or firms or to protect the country from a situation of financial distress.

Financial nationalism can be defined as the set of policies, rules, and administrative decisions that governments and regulatory agencies make to maintain the control of the national financial and monetary system, with the objective of insulating it from foreign political or economic forces. This phenomenon can manifest itself in various forms, from the adoption of controls on the flow of capital to localization requirements for FinTech firms. However, as shown in Part IV, financial nationalism typically takes key forms. The most typical phenomenon is the embrace of monetary

32. Clift & Woll, *supra* note 16, at 308.

33. BERNARD HOEKMAN & MICHAEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 38–40 (2009).

34. Frances Rosenbluth & Ross Schaap, *The Domestic Politics of Globalization*, 57 INT'L ORG. 307, 334 (2003).

sovereignty as the guiding principle of economic policy. Nationalists want monetary sovereignty, since it is the prerequisite for full national control on the economy.[35] Monetary sovereignty does not mean only the full rejection of international monetary arrangements and the adoption of a national currency, but it can also entail a policy of currency internationalization as a sign of political strength and as an instrument of geopolitics.[36] This is particularly visible, for instance, in the competition between the United States, the European Union, and China over the status of their national currency as the leading global reserve currency.

Another classic example of financial nationalism is the adoption of capital and currency controls to insulate the country from speculation or foreign financial pressure, and not necessarily focusing only on speculative portfolio flows. In the worst cases, capital controls are accompanied by broader nationalizations of enterprises and debt repudiation, as in the recent case of Venezuela.[37] This is often accompanied by attacks against international organizations, typically the International Monetary Fund, or "foreign powers" accused of plotting against the defaulting state. Another form is financial repression, namely the obligation of citizens to buy portions of the national debt stock to reduce the dependency of the country on foreign credit and, therefore, to free themselves from the economic pressure coming from external interest groups. Finally, financial nationalism typically manifests itself in increased distrust or a full-front political attack against independent agencies, usually the central bank, which are seen as advocating the interests of the international community, rather those of their own governments.

Like other versions of nationalism, financial nationalism is not free from risks. In an interdependent global economic system, the retrenchment of finance along national lines comes with substantial costs. The literature on financial globalization, albeit clear on the economic stability risks that come with financial interdependence, it is nonetheless unequivocal on the benefits that an open financial system brings in terms of better access to credit and investment opportunities.[38] Yet, as demonstrated in a previous

35. *See generally* NATION-STATES AND MONEY: THE PAST, PRESENT, AND FUTURE OF NATIONAL CURRENCIES (Emily Gilbert & Eric Helleiner eds., 1999) (discussing the history and contemporary challenges of national currencies).

36. *See generally* BARRY EICHENGREEN ET AL., HOW GLOBAL CURRENCIES WORK: PAST, PRESENT, AND FUTURE (2017) (discussing the history and contemporary challenges of global currencies).

37. *Factbox: Venezuela's Nationalizations under Chavez*, REUTERS (Oct. 8, 2012).

38. For an overview of such literature, see Robert G. King & Ross Levine, *Finance and Growth: Schumpeter Might be Right*, 108 Q. J. ECON. (1993); Ross Levine, *Financial Development and Economic Growth: Views and Agenda*, 34 J. ECON. LIT. 688 (1997); Laura Alfaro et al., Foreign Bank Entry and Entrepreneurship (Oct. 2015) (unpublished manuscript) (on file with Columbia University).

study, the greatest risks are not faced by those states that decide to reduce their level of financial interdependence, but by those that, while maintaining a very open and globally integrated financial system, decide to reduce regulatory cooperation.[39] In an interconnected financial system in which the perimeter of markets is global but policy is national, regulatory divergence reduces the benefits of economic integration and, crucially, increases the risk of instability. This latter scenario forms the object of this study.

III. A BRIEF HISTORY OF FINANCIAL AUTARCHY

Restricting the freedom to lend, invest, and move currency is scarcely a new idea. Just like trade protectionism, financial nationalism has existed in one form or another since ancient times.[40] Both policies are, effectively, two sides of the same coin and are indeed very often adopted together. This section will provide a historical overview of financial nationalism since the birth of modern finance.

A. Renaissance to Gold Standard

The period between the Renaissance and the demise of the Gold Standard stretches across five centuries of financial innovations, from double-entry bookkeeping to the rise of modern capital markets.[41] In this period, international finance grew from being a service mostly in support of wars and expeditions to a widespread industry able to cater to the needs of firms, states, and individuals.

Until the late industrial revolution cross-border flows were more limited, as finance relied mostly on local capital, except perhaps for the financing of wars or large expeditions. Yet there are still some examples of financial nationalism during this period. Exchange controls were a fundamental aspect of ancient mercantilist policies needed to maintain a positive trade balance against foreign states. In *Discourse of the Common Wealth of this Realm of England,* a sixteenth-century treatise on economic policy, the author urged the English to ". . . always take heed that we buy no more from strangers than we sell them, for so should we impoverish ourselves and enrich them."[42] To do so, the export of gold and other means

39. *See generally* LUPO-PASINI, *supra* note 6 (discussing the successes and failures of various international law regimes in protecting financial sovereignty).

40. *See generally* PAUL EINZIG, THE HISTORY OF FOREIGN EXCHANGE (1970) (discussing the history of foreign exchange and financial nationalism).

41. On the history of finance, see WILLIAM GOETZMANN, MONEY CHANGES EVERYTHING: HOW FINANCE MADE CIVILIZATION POSSIBLE (2016).

42. W.S., DISCOURSE OF THE COMMON WEAL OF THIS REALM OF ENGLAND 63 (Elizabeth Lamond ed., 1581), https://archive.org/details/discourseofcommo00lamouoft/page/n5.

of payment was often discouraged, if not prohibited.[43] Modern trade policy is the very opposite of mercantilism, but we can nonetheless see that capital controls are still used in the context of a balance of payments crisis. When national reserves are scarce, countries often resort to the imposition of exchange controls to minimize the outflow of scarce currency.[44] For instance, General Agreement on Trade and Tariffs (GATT) Article XV:5 and General Agreement on Trade in Services (GATS) Article XII:1 of the World Trade Organization (WTO) Agreements allow Members to impose restrictions on the movement of capital and on currency to prevent or to impede a monetary crisis.[45]

The history of sovereign debt similarly presents a very long list of clashes between debtor states and foreign banks, usually followed by periods of financial autarchy and a litany of national revindications.[46] In one of the best historical accounts on sovereign defaults, Reinhart and Rogoff show that even in the Middle Ages, European states such as England, Spain, and France had a habit of defaulting on their debt against domestic and foreign creditors who were often forced into bankruptcy, if not sentenced to death.[47] Although sovereign defaults were often the result of a mix of bad domestic policies and adverse market conditions, they almost always culminated in a barrage of financial protectionist policies, such as the suspension of outstanding payments to foreign creditors, currency controls, and sometimes creeping expropriations. Inevitably, the position of financial autarchy was often imposed upon the sovereign by the markets, which refused to lend to a defaulting creditor.

The early Industrial Revolution period lasting until the repeal of the Corn Law in 1847 England—the very first seismic change in modern international economic policy—features very limited cross-border financial

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43. William R. Allen, *Mercantilism*, *in* 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 455 (John Eatwell et al. eds., 1987).

44. Isaiah Frank, *Import Quotas, the Balance of Payments and the GATT*, 10 WORLD ECON. 307, 307–18 (1987).

45. Gary Horlick & Martin Dubeck, *Article XII*, *in* 5 WTO – TRADE IN GOODS, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW 306 (Rolf Wolfrum et al. eds., 2008); Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J. INT'L L. 561, 561–62 (2002); Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. L. REV. 1249, 1255 (2000).

46. *See generally* CARMENT REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLIERS (2011) (discussing historical examples of government debt leading to financial crisis); MICHAEL WAIBEL, SOVEREIGN DEFAULTS IN FRONT OF INTERNATIONAL COURTS AND TRIBUNALS (2012) (discussing the ways in which international tribunals balance sovereign capacity to pay against creditor claims).

47. Carmen Reinhart et al., *Debt Intolerance*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 11 (2003).

flows. This considerably reduced the scope of financial protectionist policies. However, the period between the second half of the nineteenth century and the first three decades of the twentieth century featured an unprecedented level of economic integration. The decision of European states and the United States to link their currency to gold—the so-called Gold Standard—gave impetus to international trade.[48] The great European powers, namely England, Germany, and France, engaged substantially in export activities towards the new world, which, in turn, fueled a parallel process of financial development.[49] England's cross-border lending rose from two to eight percent of gross domestic product, while the stock of foreign assets held by English investors rose to eighteen billion pounds.[50] The Gold Standard era, for the first time, featured limited financial protectionism. Capital controls were extremely rare, as monetary authorities had the goal of maintaining capital mobility, and there were few restrictions on foreign investments in the domestic economy.[51]

B. Bretton Woods to 1974

It was not until the first part of the twentieth century that financial protectionism became an active policy tool in the armory of central banks and treasuries. The Wall Street crash of 1929 triggered a debt crisis in Germany and eastern European states that led to the dismantling of the Gold Standard and the imposition of capital controls, exchange restrictions, and competitive devaluation in most European states.[52] In this complex environment plagued by war and the collapse of free trade, only the United States maintained an open approach to financial globalization. The United States believed that capital and exchange controls were inherently negative and worthy of totalitarian states.[53] Up until then, financial nationalism had not had any particular moral or theoretical underpinning. Restrictions on capital and currency mostly served to complement trade protectionist

48. *See* EICHENGREEN, *supra* note 4, at 6–43.

49. *See generally* HERBERT FEIS, EUROPE: THE WORLD BANKER 1870-1914 (1965) (discussing European foreign investment in the nineteenth century); CHARLES HOBSON, THE EXPORT OF CAPITAL (1914) (discussing the history and growth of foreign investment); Matthew Simon, *The Pattern of New British Portfolio Foreign Investment, 1865–1914*, *in* THE EXPORT OF CAPITAL FROM BRITAIN 15 (A.R. Hall ed., 1968) (discussing pre-1914 British international capital movements and their political and social repercussions in more recent world politics).

50. Atish R. Ghosh & Mahvash S. Qureshi, *What's in a Name? That Which We Call Capital Controls* 7 (IMF, Working Paper WP/16/25, 2016).

51. *Id.*

52. *Id.*

53. *Id.* at 14. *See generally* ARTHUR BLOOMFIELD, CAPITAL IMPORTS AND THE AMERICAN BALANCE OF PAYMENTS 1934-39 (1950) (discussing the intricacies of the United States' international finance policies between Worlds Wars).

policies or to maintain economic stability. Hence, they were the by-product of other and more contentious economic policies that were at the epicenter of the economic debate.

The second phase of financial protectionism, paradoxically, starts when the conditions for the rebound of economic globalization returned at the end of World War II. It was in this period that financial protectionism became an ideological choice. As John Maynard Keynes put it, the "control of capital movements, both inward and outward, should be a permanent feature of the post-war system."[54] Harry Dexter White, the other architect of the Bretton Woods monetary system together with Keynes, was opposed to free capital mobility on pure economic grounds.[55] He believed that it would allow countries to set the interest rate independently and therefore to conduct monetary and economic policy autonomously.[56] Their views fundamentally shaped the global financial and monetary architecture that persisted until the dismantling of the U.S. dollar-gold parity in 1974. This stance was reflected in Article VI:3 of the International Monetary Fund (IMF) Articles, which allows members to "exercise such controls as are necessary to regulate international capital movements."[57] In the forty years since the beginning of financial liberalization in the 1980s, most countries imposed capital controls, mainly on the outflow of capital.[58] This drastically limited any form of cross-border finance. Unlike previous phases, however, financial protectionism did not entail currency restrictions that were prohibited by the IMF Articles and the WTO GATT, since currency restrictions would limit international trade.[59]

C. The Rise of (Selective) Financial Cooperation

The period from the late 1970s until the global financial crisis is unanimously considered as the heyday of financial globalization. The demise of the U.S. dollar-gold parity in 1974 and the rise of the eurocurrency market

54. John Maynard Keynes, *Proposals for an International Currency (or Clearing) Union* (1942), *reprinted in* THE INTERNATIONAL MONETARY FUND 1945–65 13 (J. Keith Horsefield ed., 1969).

55. JEFFREY M. CHENWORTH, CAPITAL IDEAS: THE IMF AND THE RISE OF FINANCIAL LIBERALIZATION 63–70 (2010).

56. *Id.*

57. Articles of Agreement of the IMF, art. VI § 3, 60 Stat. 1401, 2 U.N.T.S. 39 (2016). *See also* Legal Dep't, *Capital Movements: Legal Aspects of Fund Jurisdiction Under the Articles*, SM/97/32 Supp. 3 (Feb. 21, 1997).

58. Ghosh & Qureshi, *supra* note 50.

59. *See* Articles of Agreement of the IMF, art. XVIII § 2, 60 Stat. 1401, 2 U.N.T.S. 39; General Agreement on Tariffs and Trade 1994 art. XI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

propelled the progressive integration of national financial systems.[60] The process of liberalization started slowly with the gradual removal of capital controls in western economies. During this phase, only a few banks put their foot into another state's financial system. While capital controls on the outflow of capital were reduced and cross-border lending allowed, restrictions on the establishment of commercial presence by foreign financial institutions were still widespread. In the 1980s, however, cross-border banking started to emerge as a force in global markets. The Organisation for Economic Co-operation and Development (OECD) Code on Capital Movements and Invisible Operations was the very first international agreement focused on dismantling barriers to cross-border finance.[61] The movement for financial integration was spurred by the European ambitions to achieve a fully-integrated, single market among European states. As stated in the Delors Report 1989, this would have never been completed unless European firms were allowed to operate in other European states' financial systems.[62] American and Japanese banks also became more and more international. The process of financial globalization culminated in the early 1990s' *Washington Consensus*, which featured the liberalization of financial systems and the total removal of any restrictions on capital flows as one of its core tenets.[63] When the WTO GATS Annex on Financial Services was finally agreed upon in 1997, the regulatory architecture to support financial liberalization was complete.[64] IM and Bank for International Settlements (BIS) data on financial globalization shows that before the global financial crisis, the global financial system reached its highest level of integration with the emergence of giant banking conglomerates operating across the globe and hyper-connected capital markets.[65]

The first threat to this hyper-financial globalization came from

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60. *See generally* EICHENGREEN, *supra* note 4.

61. ABDELAL, *supra* note 4, at 86–123; Organisation for Economic Co-operation and Development [OECD], *Code of Liberalisation of Capital Movements* (2011), http://dx.doi.org/10.1787/9789264110779-en; OECD, *Codes of Liberalisation: User's Guide* (2007); OECD, *Forty Years' Experience with the OECD Code of Liberalisation of Capital Movements* 7 (Oct. 2002); PIERRE PORET, The Experience of the OECD with the Code of Liberalisation of Capital Movements (2000) (presented at the IMF seminar). For the most updated version of the Code, see OECD, *Code of Liberalisation of Capital Movements* (2019), https://www.oecd.org/daf/inv/investment-policy/OECD-Code-capital-movements-2019-EN.pdf.

62. ABDELAL, *supra* note 4, at 54–86.

63. *See* John Williamson, Senior Fellow, Institute for Int'l Econ., The Washington Consensus as Policy Prescription for Development 6–8 (Jan. 13, 2004), https://www.piie.com/publications/papers/williamson0204.pdf (listing "[f]inancial liberalization" and the abolition of barriers to direct foreign investment as part of the "Ten Commandments" of the Washington Consensus).

64. *See* SYDNEY J. KEY, THE DOHA ROUND AND FINANCIAL SERVICES NEGOTIATIONS (2003) (stating that the agreement on the Annex on Financial Services was formally reached on Dec. 12, 1997, while the text entered into force on Mar 1, 1999).

65. IMF, *supra* note 4.

emerging economies. The literature on international finance has never been fully supportive of financial integration in the same way that it has for international trade.[66] In an influential article, Jagdish Bhagwati questioned the wisdom of financial globalization; as he argued, trading in widgets and trading in dollars is not the same.[67] Indeed, in a matter of five years, the hopes that financial globalization would solve the problems of economic development were dashed by a series of financial and monetary crises fueled by global capital flows. First came the 1997 East Asian financial crisis, which questioned the limits of financial liberalization in Asia.[68] Then, the Russian and Argentine sovereign debt crises in 2000 and 2001, respectively, showed once again the dangers of the sovereign debt markets and over-indebtedness.[69] In past occasions, the recipe for regaining monetary stability was a combination of IMF loans, capital controls, banking protectionism, a very painful haircut to creditors, and the general retrenchment of finance along national lines. In this case however, the reasons for the protectionist policies and capital controls, many of which were then lifted over time, albeit with difficulty, were the protection of monetary and financial stability. Only on one occasion, in Argentina, has financial protectionism had a broader political connotation; that is, the protection of national pride against foreign capital markets.[70]

The situation in Western economies was much easier, as monetary and structural conditions permitted the safe opening of markets to financial liberalization and capital flows. Yet despite the tight level of liberalization, this phase saw the emergence of different forms of financial protectionism:

66. For an overview of the literature prior to the crisis, *see generally* Stijn Claessens, *Regulatory Reform and Trade Liberalization in Financial Services*, *in* DOMESTIC REGULATION AND TRADE LIBERALIZATION IN SERVICES 129 (Aaditya Mattoo & Pierre Suavé eds., 2003); GLOBALIZATION AND SYSTEMIC RISK (Douglas D. Evanoff et al. eds., 2009).

67. Jagdish Bhagwati, *The Capital Myth: The Difference Between Trade in Widgets and Dollars*, 77 FOREIGN AFF. 7, 8 (1998).

68. Ross P. Buckley & Sarala M. Fitzgerald, *An Assessment of Malaysia's Response to the IMF During the Asian Economic Crisis*, 2004 SING. LEG. STUD. 96, 97 (2004).

69. *See* ROSS P. BUCKLEY & DOUGLAS W. ARNER, FROM CRISIS TO CRISIS: THE GLOBAL FINANCIAL SYSTEM AND REGULATORY FAILURES 83–85 (2011) (discussing the Russian and Argentine sovereign debt crises).

70. Argentinian Presidents Néstor Kirchner (2003–2007) and Cristina Kirchner (2007–2011) were adamantly opposed to the opening of Argentina to capital markets due to the stand-off with international creditors. The stance changed in 2016 under President Mauricio Macri, who settled the long-standing dispute with creditors and paved the way for the re-opening of international credit lines to Argentina by international capital markets. *See* Michael Stott & Benedict Mander, *Argentina: How IMF's Biggest Bailout Crumbled Under Macri*, FIN. TIMES (Sept. 1, 2019), https://www.ft.com/content/5cfe7c34-ca48-11e9-a1f4-3669401ba76f (describing the financial crisis, resulting bailout agreement, and subsequent market chaos in Argentina). On the dispute between Argentina and the investors, see Arturo C. Porzecanski, *The Origins of Argentina's Litigation and Arbitration Saga, 2002-2016* (MPRA Paper No. 79122, May 2017).

selective regulation and policy divergence. This time, the worry of policymakers regarding the adoption of nationalist policies was no longer the risks posed by an open capital account, but rather the erosion of regulatory and supervisory sovereignty.[71] The goal was no longer to prevent foreign banks from providing financial services to local customers or to safeguard monetary stability, although this was still present in emerging markets, but rather to maintain a political grip on those aspects of banking policy that are particularly sensitive or strategic. During this phase, the adoption of capital controls gave way to a subtler form of nationalism that mostly manifested itself in regulators' reluctance to fully cooperate on supervisory and regulatory policies, especially when these were perceived to be contrary to national interests.[72] This might sound surprising, given that it is precisely in this period that the Basel Committee on Banking Supervision was established to enhance regulatory cooperation in banking matters.[73] Two of the key standards on international banking—the Basel Concordat and the Basel Accords—were negotiated to reduce regulatory and supervisory frictions among national authorities and are widely believed to have greatly helped level the regulatory playing field for global finance. Yet beneath the façade of cooperation, regulators were always very aware of the risks that the full erosion of financial sovereignty might have entailed.

The global financial crisis of 2008 and the European sovereign debt crisis of 2010–12 clearly showed the limits of cooperation in finance, especially if compared to achievements in other areas like international trade or investment. First of all, the process of regulatory convergence on financial standards did not bind regulators to a detailed regulatory playing field. Instead, the regulatory perimeter of global finance was predicated on the voluntary adoption of a few key international standards and numerous guidelines and declarations of principle.[74] In many instances, this led to actual regulatory divergence as regulators opted for the interpretation of the standards that was more favorable to them, rather than what would have been optimal for the global financial system.[75] Secondly, critical areas in the

71. *See* LUPO-PASINI, *supra* note 6.

72. On capital controls, see Ghosh & Qureshi, *supra* note 50.

73. *See generally* CHARLES GOODHART, THE BASEL COMMITTEE ON BANKING SUPERVISION: A HISTORY OF THE EARLY YEARS 1974–1996 (2012) (discussing the formative years of the Basel Committee); GEORGE ALEXANDER WALKER, INTERNATIONAL BANKING REGULATION: LAW, POLICY, AND PRACTICE (2001) (discussing historical and contemporary efforts to incentivize and enforce international banking regulation). The Basel Committee on Banking Supervision was founded in 1974.

74. BRUMMER, *supra* note 5; Mario Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Settings*, *in* INTERNATIONAL MONETARY LAW: ISSUES FOR THE NEW MILLENNIUM 3, 33 (Mario Giovanoli ed., 2000); Chris Brummer, *How International Financial Law Works (and How it Doesn't)*, 99 GEO. L.J. 257, 263 (2011).

75. DANIEL K. TARULLO, BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL

functioning of the global financial system, such as cross-border resolution and insolvencies, were left in the hands of national authorities.[76] As Lord Mervin King succinctly put it, this led to a situation whereby "global banks [were] global in life but national in death."[77]

The quintessential example of these protectionist tendencies is how the Lehman Brothers' insolvency in 2008 was managed in a way to protect the interests of U.S. creditors, to the detriment of the bank's European and global operations.[78] Other illuminating examples include the disorderly resolutions of Fortis Bank and Dexia during the European sovereign debt crisis of 2010–12.[79] The sovereign control on cross-border banks was not limited to resolution and insolvencies, but extended also to supervisory practices, which were paradoxically subject to a decent degree of cooperation. The literature on home-host supervisory coordination, indeed, has widely reported the incentive problems faced by national supervisory authorities in their cooperation with foreign counterparts since the Banco Ambrosiano and Bank of Credit and Commerce International in the 1980s.[80] The history of cross-border banking reports various occasions in which supervisors prefer to forbear from disclosing the true status of the bank to protect local creditors or to prevent a sell-off.[81] The problems of supervisory cooperation became all too apparent in the context of the European sovereign debt crisis when various countries refused to cooperate with fellow European supervisors in resolving failing banks.[82] In one instance, the *Icesave* crisis, the home authority refused to abide by its legal obligations to provide depositor protection to U.K. and Dutch retail depositors, as required by E.U. law.[83]

REGULATION 218–21 (2007). *See also* Narissa Lyngen, *Basel III: Dynamics of State Implementation*, 53 HARV. INT'L L.J. 519, 522 (2012) (discussing the pressures on regulators to seek self-serving regulations).

76. Rosa M. Lastra, *International Law Principles Applicable to Cross-Border Bank Insolvency*, *in* CROSS-BORDER BANK INSOLVENCY 161, 161 (Rose M. Lastra ed., 2011).

77. THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS 36 (2009).

78. DIRK SCHOENMAKER, GOVERNANCE OF INTERNATIONAL BANKING: THE FINANCIAL TRILEMMA 72–76 (2013).

79. STIJN CLAESSENS ET AL., A SAFER WORLD FINANCIAL SYSTEM: IMPROVING THE RESOLUTION OF SYSTEMIC INSTITUTIONS 49–51 (2011).

80. For examples of the literature, see generally CROSS BORDER BANKING: REGULATORY CHALLENGES (Gerard Caprio Jr. et al. eds., 2006); Kathia D'Hulster, *Cross Border Banking Supervision Incentive Conflicts in Supervisory Information Sharing Between Home and Host Supervisors* (World Bank Policy Research, Working Paper No. 5871, 2011).

81. INTERNATIONAL FINANCIAL INSTABILITY: GLOBAL BANKING AND NATIONAL REGULATIONS 440–41 (Douglas D. Evanoff et al. eds., 2007).

82. CROSS-BORDER BANKING IN EUROPE: IMPLICATIONS FOR FINANCIAL STABILITY AND MACROECONOMIC POLICIES 41–42 (Franklin Allen et al. eds., 2011).

83. Case E-16/11, EFTA Surveillance Authority v. Iceland, 2011 E.F.T.A Ct. Rep. 4. For analyses of the case, see M. Elvira Mendez-Pinedo, *Iceland and the EU: Bitter Lessons after the Bank Collapse and the Icesave Dispute*, 3 CONTEMP. LEGAL & ECON ISSUES 9 (2011); M. Elvira Méndez-Pinedo, *The*

III. THE RE-EMERGENCE OF FINANCIAL NATIONALISM

The global financial crisis and the European sovereign crisis were turning points in the regulation of finance. The regulatory and supervisory loopholes so evident in the functioning of the global financial system propelled a number of reforms in the actual regulation of banks and capital markets and in the global financial architecture. With regard to the latter, the IMF has acquired a more preponderant supervisory role in monitoring global financial stability and global imbalances.[84] The Financial Stability Board was created recently to monitor progress in the regulation of finance among G20 and BIS countries and to propose new regulations, essentially acting as a think-tank on global financial reforms.[85] In the European Union, the problems of supervisory cooperation have been addressed—at least among Eurozone countries—by transferring the competences to supervise and resolve European banks to two supranational European authorities.

Yet despite these regulatory and institutional changes, we are now witnessing the re-emergence of new, and sometimes more populist and adversarial, forms of financial nationalism.

A. Regulatory Unilateralism

Regulatory cooperation through the adoption of common, prudential standards for financial institutions was one of the key developments in the post-Bretton Woods financial system. Although regulatory convergence never reached full harmonization outside the European Union, and by no means covered the entire scope of prudential regulations, it nonetheless put western countries on a similar regulatory playing field in key areas. The entire edifice of global financial regulation rested on the tacit commitments by national regulators to work together behind the closed doors of the various TRNs until an agreement could be found. Given the differences in regulatory philosophies, economic needs, and ambitions among the TRNs' members, conflicts often arose, but they were always dealt with behind the scenes.[86] More importantly, they never threatened members' commitment to cooperate or their core belief in the importance of the TRN's work. Yet recent political changes in the United States with the Trump presidency and in Europe with Brexit seem to question the sustainability of this trajectory.

Icesave Saga: Iceland Wins Battle before the EFTA Court, 1 MICH. J. INT'L L. 101 (2013).

84. IMF, *Vulnerabilities in a Maturing Credit Cycle*, Global Financial Stability Report (Apr. 2019).

85. Stavros Gadinis, *The Financial Stability Board: The New Politics of International Financial Regulation*, 48 TEXAS INT'L L.J. 157, 158–59 (2013).

86. *See* GOODHART, *supra* note 73, at 77 ("[M]uch of the exchange of information, the building-up of mutual trust and the overall value of such meetings resides in the informal discussions held, owing to the existence of the formal meeting, but outside its regular meetings.").

1. Uncertainties in Trump's Regulatory Reforms

The very first threat to regulatory cooperation came from the new approach to financial regulation of the Trump Presidency. During the election campaign and immediately upon entering office, President Trump openly voiced his dissatisfaction with the current financial regulatory framework and repeatedly urged a change in U.S. policy. In February 2017, the President signed Executive Order 13772: "Core Principles for Regulating the United States Financial System," which sets forth seven fundamental principles of U.S. financial regulation.[87] One of those principles is to "[a]dvance American interests in international financial regulatory negotiations and meetings."[88] This can be read as a more interventionist, rather than accommodating, approach to financial cooperation, in which U.S. regulators would not back off from fighting any standard that could negatively affect the U.S. financial system. The Executive Order indeed contains another fundamental principle, "enable American companies to be competitive with foreign firms in domestic and foreign markets."[89] Engaging in international standard-setting fora is critical for promoting U.S. interests across the global financial system, as they are meant to act as the vehicle for this, rather than unilateral actions.

Yet the Financial CHOICE Act 2017, which passed the House on June 8 and is still pending in the Senate, poses a far greater danger for policy coordination.[90] From a cooperation viewpoint, the Act would increase the role of the U.S. Senate in the pre-negotiation stage of international financial standards so that the various U.S. agencies would have to declare and gain approval for their negotiating position before going to standard-setting international organizations.[91] This could make international cooperation more challenging, as it would reduce the negotiating freedom of U.S. regulators for a parallel increase in political oversight.

In April 2017, the President requested the Secretary of the Treasury to review the role of the Orderly Liquidation Authority (OLA) in the Dodd-Frank Act with the goal to return to a pre-Lehman bankruptcy regime for financial institutions.[92] In the last five years, the U.S. Federal Deposit

87. Exec. Order No. 13772, 82 Fed. Reg. 9965 (Feb. 8, 2017).

88. *Id.*

89. *Id.*

90. *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

91. Anna Gelpern, Conference: US Interest in International Financial Cooperation 30 (March 17, 2017), https://www.piie.com/file/12930/.

92. *See* Lalita Clozel, *Trump Invites Trouble In Targeting FDIC Resolution Powers*, AM. BANKER (Apr. 21, 2017), https://www.americanbanker.com/news/trump-invites-trouble-in-targeting-fdic-resolution-powers (Trump's memorandum asking for review of the OLA "is seen as an indication it will seek a legislative fix").

Insurance Corporation has increased its cooperation on cross-border banking resolution, building on the new resolution regime provided by Dodd-Frank Act. Not surprisingly, various authors have commented on the dangers that scrapping OLA would pose for international banking cooperation.[93] Thankfully, in February 2018 the U.S. Treasury rejected the idea and instead committed to simply "narrow the path of OLA," noting that this would have significantly higher regulatory costs for U.S. banks in other countries.[94]

The biggest regulatory change in U.S. financial regulation is the May 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act, commonly known as the Financial Reform Act 2018.[95] This new legislation repealed parts of the Dodd-Frank Act, which was seen as constraining the lending growth opportunities of American banks.[96] From an international cooperation viewpoint, one of the greatest dangers of Trump's regulatory reform is less-favorable, prudential treatment for non-U.S. financial organizations, which are, in certain cases, required to comply with more stringent capital adequacy standards than U.S. firms. More specifically, any foreign business organization firm with total assets of one hundred billion dollars or more would be subject to the same prudential regulations that apply to U.S. banks with two hundred and fifty billion or more of consolidated assets.[97]

The evolving situation in the U.S. regulatory sphere led to immediate repercussions and increased tensions in Basel between the European Union and the United States. These two major financial rule-makers had been fighting a war for almost five years on the regulation of Over-the-Counter Derivatives and Central Counterparties ("CCPs").[98] This regulatory turf

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93. *See* Daniel Tarullo, *Repealing Title II of Dodd-Frank*, GLOBAL CTR. FOR FIN. AND POL'Y (May 8, 2017), https://gcfp.mit.edu/tarullo-guest-blog/ (stating that changes to the OLA could lead countries to "complete ring-fencing of U.S. bank operations in their countries"); Simon Johnson, Conference: US Interest in International Financial Cooperation 31–35 (Mar. 17, 2017), https://www.piie.com/file/12930/ (discussing the importance of international cooperation to U.S. interests).

94. DEP'T OF THE TREASURY, ORDERLY LIQUIDATION AUTHORITY AND BANKRUPTCY REFORM 1–2 (2018), https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf.

95. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018).

96. *See* Joseph Lawler, *Dodd-Frank Has Hurt Small Business Lending and May Have Slowed Business Growth, New Study Says*, WASH. EXAMINER (Apr. 16, 2018), https://www.washingtonexaminer.com/policy/economy/dodd-frank-has-hurt-small-business-lending-and-may-have-slowed-business-growth-new-study-says ("The Dodd-Frank financial reform law slowed lending to small businesses and likely constrained economic growth by overburdening small banks, according to a new economic study released Monday.").

97. Jeff Berman, *US Congress Passes Dodd-Frank Reform Legislation with A Clarification (And Little Else) For Foreign Banks*, CLIFFORD CHANCE BRIEFINGS (May 2018), https://www.cliffordchance.com/briefings/2018/05/u_s_congress_passesdodd- frankrefor.html.

98. *See* LUPO-PASINI, *supra* note 6, at 150–74.

threatened to split the lucrative derivative market into two, but it was finally solved in 2016 when the U.S. Commodity Futures Trading Commission (CFTC) and the European Securities Market Authority finally announced the deal on the equivalence of CCP regimes, the so-called "common approach."[99] Not long after that, the new version of the Basel standards, dubbed by the industry as Basel IV, proved to be a new source of contention between the European Union and the United States.

The origin of the dispute was the use of internal models to calculate the risk-weight of assets; more precisely, the so called "output floor." This floor serves to prevent banks from using internal models that lead to risk estimates on the outputs that are too far from those produced by the standardized models.[100] The European Union, pushed by the interests of German and French banks, favored the status quo, which would still allow for the free use of internal models. The United States would like to scrap this in favor of a more standardized approach. One of the main areas of concern for the European Union is the use of the standardized approach to calculate the risk of government debt.[101] European banks are indeed historically prone to buying sovereign debt, especially from their own government.[102] The issue is of fundamental importance for E.U. banks at a time when they are struggling to make profits, as the standardized approach would force them to raise their capital in a market where banks have been struggling to do so.

After much fighting and various postponements, the revised standard was eventually published in December 2017.[103] Yet some commentators

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99. Press Release, U.S. Commodity Futures Trading Comm'n, The U.S. Commodity Futures Trading Commission and the European Commission: Common Approach for Transatlantic CCPs (Feb. 10, 2016), https://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016.

100. *See* Caroline Binham, *Basel III Reform Package Closer to Being Finalized*, FIN. TIMES (May 25, 2017), https://www.ft.com/content/4da280d2-40ac-11e7-82b6-896b95f30f58 (discussing BSBS Secretary General William Coen's May 2017 description of the output floor proposed as "simple and straightforward—a bank's measure of risk-weighted assets (using internal models) can, in aggregate, be no lower than, say, 70-75 per cent of the risk-weighted assets that would result if the bank had applied the standardised approaches to determine its risk-weighted assets").

101. *See* Jacek Ramotowski, *Basel IV at a Standstill*, CENT. EUR. FIN. OBSERVER (Apr. 28, 2017), https://financialobserver.eu/poland/basel-iv-at-a-standstill (discussing European banks' concern that the new standardized approach for calculating risks would mean that banks would face more capital requirements that European banks would have a harder time achieving).

102. Silvia Merler & Jean Pisani-Ferry, *Hazardous Tango: Sovereign-Bank Interdependence and Financial Stability in the Euro Area*, *in* PUBLIC DEBT, MONETARY POLICY AND FINANCIAL STABILITY 16 BANQUE DE FRANCE 201 (2012); SEBASTIAN SCHNEIDER ET AL., BASEL "IV": WHAT'S NEXT FOR BANKS? IMPLICATIONS OF INTERMEDIATE RESULTS OF NEW REGULATORY RULES FOR EUROPEAN BANKS 10 (2017), https://www.mckinsey.com/~/media/mckinsey/business%20functions/risk/our%20insights/basel%20iv%20whats%20next%20for%20european%20banks/basel-iv-whats-next-for-banks.ashx.

103. BASEL COMM. ON BANKING SUPERVISION, BASEL III: FINALISING POST-CRISIS REFORMS (2017), https://www.bis.org/bcbs/publ/d424.pdf.

have pointed out that the new standard is so vague and open to interpretation that, de facto, the standard provides ample room for regulatory divergence.[104] The new standard contains 36 "national caveats" that serve to protect regulatory discretion in the implementation of the standards. The risk of regulatory divergence caused by the diverging interpretation of the standards is not new. Indeed, the poor record of Basel II in addressing systemic risk is due to the wide flexibility that it gave in the implementation of the risk-weighting calculation model, which then led to U.S. banks being massively undercapitalized.[105] In the recent 2018 *Progress Report on the Adoption of Basel Framework*, the Basel Committee suggested that, despite the good level of implementation of certain Basel standards among BCBS members, there might be still various loopholes in the implementation of certain key aspects, namely approaches to measure exposures to CCPs, and capital requirements for exposures to CCPs.[106] Other authors have evidenced that, while OECD and Basel Committee members are formally applying the Basel standards, a wide gap remains in the actual implementation of the standards, including the previous versions of Basel I and II, in all other countries. This inevitably leads to frictions and regulatory divergence.[107]

2. The Dangers of Brexit

A very different threat comes from Brexit. One of the major fallouts from Brexit with regard to financial services is the proposal by the European Commission (Commission) to adopt a more "centralized" supervision of clearinghouses if they provide critical capital market functions for the European Union financial system.[108] If this proposal goes ahead, CCPs that are refused recognition will have to migrate to the European Union, if they want to continue to offer clearing services to E.U. traders. Estimates suggest that around €101 billion of derivatives are cleared daily in London, around ninety percent of the overall Euro-derivatives market. In a speech on June 20, 2018, Benoît Coeuré, a member of the European Central Bank (ECB) Executive Board, suggested that the regulatory and supervisory cooperation

104. Simon Samuels, *Confusion over Basel Bank Capital Requirements Fails Us All*, FIN. TIMES (Feb. 22, 2018), https://www.ft.com/content/a7ad01a4-16fa-11e8-9c33-02f893d608c2.

105. *See* TARULLO, *supra* note 75, at 236.

106. BASEL COMM. ON BANKING SUPERVISION, FOURTEENTH PROGRESS REPORT ON ADOPTION OF THE BASEL REGULATORY FRAMEWORK (2018), https://www.bis.org/bcbs/publ/d440.pdf.

107. *See* Emily Jones & Alexandra O. Zeitz, *The Limits of Globalizing Basel Banking Standards*, 3 J. FIN. REG. 89, 123–24 (2017) (stating that the need for changes to the Basel standards before they can be effectively implemented in many countries which do not have comparably established financial sectors, especially developing countries, leads to selective and shallow implementation of those standards, relative to that of more developed countries).

108. Jim Brunsden & Philip Stafford, *EU Asserts Power over City's Euro Clearing Role*, FIN. TIMES, (Mar. 13, 2019), https://www.ft.com/content/3d0b0f6a-45b3-11e9-a965-23d669740bfb.

mechanisms that are in place between the ECB and the Bank of England are in serious jeopardy after Brexit.[109] This is due to the well-known refusal of the British government to accept the jurisdiction of the European Court of Justice (ECJ).

The proposal is contained in the amendment of the European Market Infrastructure Regulation, which gives power to the European Securities Markets Authority to decide whether a clearinghouse is systemically important for the E.U. financial system and potentially to the ECB to oversee central third-country counterparties clearing euro trades.[110] The point of contention in the proposal is the ability of the Commission to refuse recognition (i.e., market access) to those CCPs that are located outside Europe and are considered as carrying excessive risks for the European financial system, due to their size or the type of transaction. If this proposal goes ahead, CCPs that are refused recognition will have to migrate to the European Union, if they want to continue to offer clearing services to EU traders. The ECB has, for a long time, advocated a return of supervision of euro-trades clearinghouses back to Frankfurt. In 2015, the ECB lost a landmark legal battle at the ECJ over the "location policy" precisely because the ECJ found the ECB to lack competence over the supervision of clearinghouses.[111]

On the British front, the Governor of the Bank of England has dismissed the ECB fears, pointing out that USD trading is also cleared outside the United States with no concerns.[112] He also warned that splitting the euro-clearing market could increase costs and inefficiencies, and potentially split the market in two. E.U. traders that are unable to move their trades from U.K. clearinghouses could face capital charges up to ten times higher than today. Yet the new regulatory approach by E.U. authorities is already having an impact on the market. In June 2018, HSBC and Barclays, two of the largest banks trading in derivatives, have decided to move their clearing operation from London to Frankfurt.[113]

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109. Benoît Coeuré, Exec. Bd. Member, European Cent. Bank, European CCPs After Brexit, Address at the Global Financial Market Association (June 20, 2017), https://www.bis.org/review/r170706b.htm.

110. Jim Brunsden & Philip Stafford, *Brussels Insists on Power to Control Euro Clearing After Brexit*, FIN. TIMES (June 12, 2017), https://www.ft.com/content/60cb441a-4f83-11e7-bfb8-997009366969.

111. Alex Barker & Philip Strafford, *Victory for UK over Eurozone Clearing Houses*, FIN. TIMES (Mar. 4, 2015), https://www.ft.com/content/425aeee0-c24f-11e4-bd9f-00144feab7de.

112. Mark Carney, Governor, Bank of Eng., A Fine Balance, Address at the Mansion House (June 20, 2017).

113. Philip Stafford, *Two Big UK Banks Shift Some Euro Clearing from London to Frankfurt*, FIN. TIMES (June 12, 2018), https://www.ft.com/content/974e17ec-6e27-11e8-852d-d8b934ff5ffa.

B. Ring-Fencing and Host-Country Control

For banks, financial globalization means the freedom to operate in another country through the establishment of branches or subsidiaries. Moving assets across the banking group allows global banks to exploit interest rate differentials, thus raising capital where it is cheaper and lending it where it is more profitable. More generally, banks can achieve allocative efficiencies and structure their investment and debt portfolio in the most profitable way across the banking group.[114] The positive effects are more pronounced when global banks penetrate through branches, as regulatory barriers on intra-corporate assets flows are minimal.[115] Not surprisingly, studies showed that when entry restrictions were minimal, foreign banks indeed preferred to operate through branches.[116] Yet since the global financial crisis, we are witnessing a progressive balkanization of banking across national lines that threatens to disrupt the globalization of finance.[117]

The word "ring-fencing" entered finance vocabulary at the outset of the global financial crisis, when both the United Kingdom and the United States adopted legislation to separate a bank's risky activities from its retail operations.[118] As such, these measures simply target the commercial and corporate functions of banks once they operate in the national territory. Yet another form of "ring-fencing" has recently emerged in financial regulatory circles and has since become synonymous with financial nationalism: the requirement for cross-border banks to separate the assets of the foreign branch or subsidiary from the parent company.[119]

The objective of geographical ring-fencing, as opposed to traditional ring-fencing, is to insulate the various national operations of the cross-border banking group from the contagion risk that would arise in the event of a

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114. SCHOENMAKER, *supra* note 78; WORLD BANK GROUP, GLOBAL FINANCIAL DEVELOPMENT REPORT 2017/2018: BANKERS WITHOUT BORDERS 21–38 (2018).

115. *See* Eugenio Cerutti et al., *How Banks Go Abroad: Branches or Subsidiaries?*, 31 J. BANKING & FIN. 1669 (2007) (discussing findings of a study of Europe and Latin America's top banks that were more likely to operate as branches in countries with lower regulatory restrictions).

116. *Id.*

117. Linda Goldberg & Arun Gupta, *Ring-Fencing and Financial Protectionism in International Banking*, LIBERTY STREET ECON. FED. RES. BANK N.Y. (Jan. 9, 2013), https://libertystreeteconomics.newyorkfed.org/2013/01/ring-fencing-and-financial-protectionism-in-international-banking.html; Wilson Ervin, *Understanding 'Ring-Fencing' And How It Could Make Banking Riskier*, BROOKINGS (Feb. 7, 2015).

118. The former adopted the legislation under the now semi-defunct Volcker rule, the latter under the Vicker's Commission Report. *See* Allison Lui, *Retail Ring-Fencing of Banks and its Implications*, 13 J. BANKING REG. 336 (2012) (explaining structural reforms and ring-fencing by the United Kingdom and United States banks).

119. For a full discussion on this topic, see Katia D'Hulster & Inci Otker-Robe, *Ring-Fencing Cross-Border Banks: An Effective Supervisory Response?*, J. FIN. PERSP. (2018).

crisis. To do so, regulators rely on a panoply of measures, ranging from exposure limits towards other companies in the group to higher capital and liquidity requirements for the foreign subsidiaries, or even restrictions on the bank management to ensure its independence from the group management.[120] Ultimately, the legal deconstruction of the firm to allocate the risk across its corporate structure can be achieved by separating the assets of the firm, preventing the firm from taking certain risks, or protecting it from the bankruptcy of other firms in the group.[121]

Yet the effect of ring-fencing on global finance is to limit the flow of capital across the banking group. Indeed, localization requirements do not wholly differ from capital controls, as banks are forced to keep their assets and most liquidity locally. Similarly, enhanced supervisory or prudential requirements are regulatory barriers that limit access to the foreign financial system. For both, the ultimate outcome is that global banking groups will reduce their global footprint and operate on a smaller scale. Hence, the classical benefits of global finance are reduced.

Ring-fencing can be adopted by both home and host supervisors. Host supervisors, for instance, often prefer to exert full control over foreign banks, rather than being subjected to the financial risks that come from branches. They do so by requiring foreign banks to establish their presence only through subsidiaries—the so-called "stand-alone subsidiary model." This allows the host supervisor to supervise and directly regulate the bank no differently than a local one, and to ensure that capital and debt are located nationally. For instance, in 2013, the Reserve Bank of India and the Reserve Bank of New Zealand issued regulations requiring foreign banks to establish through stand-alone subsidiaries and be fully subject to their supervisory requirements. Similar requirements are applied in Brazil and Mexico.[122]

In many other cases, the desire to retain a higher degree of control over the foreign bank is achieved by increasing the prudential requirements for foreign branches. For instance, in 2014, the Federal Reserve issued a rule whereby a large foreign bank with an extensive presence in the United States is required to operate through an intermediate holding company controlling all the bank's U.S. subsidiaries. This allows U.S. authorities to control the bank in the event of a crisis.[123] The operational effects of such a policy were

120. *See* Inwon Song, *Foreign Bank Supervision and Challenges to Emerging Market Supervisors* 19 (IMF, Working Paper 04/82, 2004) (discussing regulatory challenges and the various tools regulators have at their disposal).

121. *See* Steven Schwarcz, *Ring-Fencing*, 87 S. CAL. L. REV. 69 (2013) (discussing the multiple regulatory reasons in support of ring-fencing, with a particular focus on systemic risks).

122. D'Hulster & Otker-Robe, *supra* note 119, at 16.

123. This was required by section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

demonstrated in June 2018, when Deutsche Bank's U.S. subsidiary failed stress tests.[124] To reallocate assets more efficiently across the bank group and to replenish the capital of the German parent bank, Deutsche Bank's parent tried to repatriate U.S. dividends back to Frankfurt headquarters, but it was soon stopped by the U.S. regulator.[125] The U.K. Prudential Regulation Authority has established enhanced stand-alone liquidity requirements for all foreign banks' branches and subsidiaries. In Latin America, most countries subject foreign banks' branches to the same liquidity and capital requirements of subsidiaries. In 2016, the European Commission proposed the application of a rule called the Intermediate Parent Undertaking (IPU), mimicking the U.S. Intermediate Holding Company insofar as it requires large foreign firms operating in the European Union to ring-fence capital to protect the firm in the event of distress.[126] Reports suggest that after two years of negotiation, the Commission will probably publish the final proposal.[127]

Home authorities sometimes impose limits on their home banks' international expansion and on the level of support from the parent to the foreign affiliates. Before the crisis, it was not uncommon for host supervisors to expect the parent bank to support the foreign branches and subsidiaries in times of crisis under what was called the "source of strength" doctrine.[128] Yet this often came with considerable risks for the home financial system, as the parents sometimes had to be bailed out to cover losses in its foreign affiliates. For instance, in 2015 the collapse of Portugal's Banco Espirito Santo, among others, was caused by the extensive transfers of funds from the parent bank to the subsidiaries in Africa and Panama. Typically, Spanish banks are subject to very tight supervisory controls by the home authorities over the level of support given to their foreign operations in Latin

124. Stress tests are simulations of a particular economic scenario—usually an economic and financial crisis—that all banks are required to conduct. Stress tests are designed and supervised by Central Banks and serve to assess how banks and the financial system would behave during a crisis. Laura Noonan & Barney Jopson, *Deutsche Bank Failure in US Stress Test Could Harm Strategic Plan*, FIN. TIMES (June 29, 2018), https://www.ft.com/content/db7f1a64-7bac-11e8-bc55-50daf11b720d.

125. *Id.*

126. *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/36/EU as Regards Exempted Entities, Financial Holding Companies, Mixed Financial Holding Companies, Remuneration, Supervisory Measures and Powers and Capital Conservation Measures*, COM (2016) 854 final (Nov. 23, 2016).

127. Conor MacManus & Mete Feridun, *Intermediate Parent Undertaking: Time to Prepare*, FSRR (Sept. 19, 2018), https://pwc.blogs.com/fsrr/2018/09/intermediate-parent-undertaking-time-to-prepare.html.

128. *See generally* Paul L. Lee, *The Source-of-Strength Doctrine: Revered and Revisited—Part I*, 129 BANKING L.J. 771 (2012) (discussing the source of strength-of-strength doctrine and its application to the Dodd-Frank Act).

America.[129]

Finally, it is worth mentioning the recent developments on financial integration in the context of the Association of South East Asian Nation (ASEAN), which show the predilection for a model of integration based on host-country control.[130] As part of the ASEAN Economic Community Blueprint 2025, which aims at creating a single market in the ASEAN region, ASEAN members have agreed to progressively integrate their financial sectors.[131] The key pillar for banking is the ASEAN Bank Integration Framework. According to this instrument, qualified ASEAN Banks will be able to establish a commercial presence in another ASEAN jurisdiction with which their home regulator has entered into a mutual recognition agreement. Crucially, they will be able to do so only to the extent that they comply with the host's supervisory and prudential requirements.[132]

C. Digital Protectionism

An emerging problem is the impact of digital protectionism on the burgeoning FinTech sector. Finance has been caught by a dramatic digital revolution over the last five years. The traditional business models of banks and payment intermediaries are increasingly challenged by a new way of doing business relying solely on the power of digital platforms. This model often bypasses the regulatory and financial constraints of the traditional brick and mortar banks. These newcomers to the financial world include online digital lenders, e-payment providers, and a variety of support services, all operating through online platforms and relying in one way or another on the network externalities of the internet. These new financial intermediaries—what Brett King defined as "Bank 3.0"—pose very different regulatory risks compared to traditional banks and, consequently, are subject to very different policy challenges.[133]

One of the main challenges comes from the hybrid nature of FinTech firms, which rely heavily on the use and storage of data. Data are

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129. D'Hulster & Otker-Robe, *supra* note 119*,* at 5. *See also* Jonathan Fiechter et al., *Branches or Subsidiaries: Does One Size Fit All?* 22 (IMF, Staff Discussion Note SDN/11/04, 2011) (discussing the Spanish cross-border banking model).

130 *See* Federico Lupo-Pasini, *Banking Integration in ASEAN and the Challenges of Regulatory Cooperation*, *in* ASEAN LAW IN THE NEW REGIONAL ECONOMIC ORDER: GLOBAL TRENDS AND SHIFTING PARADIGMS 129, 129–48 (Mercurio & Hseih eds., 2019).

131. Assoc. of Southeast Asian Nations [ASEAN], *Economic Community Blueprint 2025* (Nov. 2015), https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf; Geert Almekinders et al., *ASEAN Financial Integration* (IMF Working Paper No. WP/15/34, 2015).

132. *See* Lupo-Pasini, *supra* note 130.

133. Financial Stability Board [FSB], *Summary Report on Financial Sector Cybersecurity Regulations, Guidance and Supervisory Practices* (Oct. 13, 2017).

increasingly becoming a precious asset for all sort of firms, including traditional financial institutions. In the United Kingdom, the "Open Banking" initiative, the U.K. version of the E.U. Payment Service Directive 2, requires banks to share customer data with competitors. Moreover, financial institutions are under increased pressure to guarantee that the storage of their data on cloud services are protected from hackers. However, the importance of data for FinTech firms goes further than that. For instance, e-payment providers often operate through mobile platforms connected to underlying mobile services or e-commerce services. Many crowd-funding and crowd-investing platforms similarly rely on the data provided by their customers to liaise with financial providers in the supply of loans or capital. Finally, a few start-ups have begun to offer financial services to unbanked individuals simply by elaborating data from social media platforms and mobile operators.

The international cooperation challenge affecting FinTech firms and, to a lesser extent traditional firms, is the tendency seen in certain key financial jurisdictions to limit the flow of data.[134] For instance, according to the new E.U. General Data Protection Regulation, financial firms are required to geo-localize data and are allowed to transfer it outside of the E.U. through specific model clauses or to those countries with which specific agreements on privacy protection exist.[135] In China, the Great Firewall has prevented the use of a number of foreign applications that are considered a threat to national security, some of them indirectly connected to financial services. Other great users of geo-localization are India, Indonesia, Russia, and Vietnam, which constitute around twenty-five percent of the world's population.[136] Moreover, the regulatory framework applicable to the use of cloud services, an increasingly fundamental issue for banks, consistently varies among jurisdictions. This ultimately constitutes a barrier to trade for the international operations of financial institutions.[137]

One of the biggest threats to global digital finance comes from the protectionist policies of certain countries against emerging FinTech giants coming from China. According to the "Made in China 2025" initiative, China plans to become a tech giant by 2025, and FinTech is one of the key areas of development. Alipay, WeChat, and AntFinancial are just a few

134. Alan Beattie, *Data Protectionism: The Growing Menace to Global Business*, FIN. TIMES (May 18, 2018), https://www.ft.com/content/6f0f41e4-47de-11e8-8ee8-cae73aab7ccb.

135. Jaime Vazquez & Martin Boer, *Addressing Regulatory Fragmentation to Support a Cyber-Resilient Global Financial Services Industry*, INST. INT'L FIN. 4 (Apr. 2018).

136. Beattie, *supra* note 134.

137. *See generally* ASIA CLOUD COMPUTING ASS'N, ASIA'S FINANCIAL SERVICES: READY FOR THE CLOUD (2014) (discussing the struggle of Asia Pacific countries to adopt their financial regulations to cloud-service technologies).

among the thousands of new firms offering financial services through internet and mobile platforms. At present, the Chinese market for e-payments is the biggest in the world, with around 731 million users. The Chinese strategy relies heavily on the progressive expansion of its services in foreign markets—chiefly among them, the rise of Huawei as a dominant player in the Telecom market and already the first supplier of 5G technology in Europe. In the Fintech sphere, the greatest expansion is Alipay, which already competes with local operators in Africa. In this context, a few countries have already voiced their distrust of Chinese Fintech providers, which are seen as too close to the Chinese government and thus potentially able to use customers' data for reasons other than the pure supply of service.

Another potential challenge comes from the increased restrictions on crypto-assets and, more generally, blockchain-based assets. Unlike classical platforms, blockchain is based on a decentralized ledger that connects users and servers located in different countries. Right now, regulators across the globe have very different approaches to the regulation of smart-contracts and tokenized securities. For instance, the U.S. Securities and Exchange Commission and the Singaporean Monetary Authority have declared some blockchain token offerings as securities, which are subject to local disclosure and trading standards.[138] In South Korea, they were declared illegal.[139] If no regulatory convergence is achieved, blockchain offerings could either be limited to one country or risk being left in a dark frontier of cyberspace.

D. Fragmentation in International Payments

Another problem of international cooperation concerns the fragmentation of the international payment system. The international payment system is the artery that makes the blood of finance flow. Like its domestic equivalent, it is based on a very complicated infrastructure made of progressive layers of clearing and settlements arrangements, supported by additional key facilities provided by a few players, such as the Society for the Worldwide Interbank Financial Telecommunication (SWIFT), that maintain a quasi-monopoly status in the provision of their service. The main implication of this interdependent structure is that if one of the links in the chain of payment breaks, the payment transmission stops.[140]

From a legal perspective, an international payment transaction rests on a series of private contractual arrangements between a few large banks that agree to provide clearing and settlement services to each other and to their

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138. PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW: THE RULE OF CODE 102 (2018).

139. *Id.*

140. *See* JOHN ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 391–409 (2016).

respective affiliates and customers to enable a cross-border payment transaction. In jargon, this is called a correspondent banking relationship. Under this arrangement, one bank—the correspondent—provides a deposit account and ancillary services to the other bank—the respondent—whose account is debited or credited when a transaction is operated. Correspondent banking is fundamental for international payments, as it covers a large variety of financial flows, from trade finance, to retail payments, short-term borrowing, and trading in foreign currency.[141] Not all banks can exert the role of correspondent, since, in many jurisdictions, access to the central bank payment system is reserved to large institutions. Moreover, since international payments are usually in one of the few reserve currencies—mostly the U.S. dollar, the euro, the yen, and the U.K. pound—international payments must pass through a clearing bank located in the jurisdiction where the currency is legal tender, essentially meaning one of the four largest financial centers. As such, correspondent banks in key financial centers play a disproportionately critical role in the functioning of the world payment landscape.

The IMF, the BIS Committee on Payments and Market Infrastructure, and the Financial Stability Board have reported a drastic decline in correspondent banking relationships since the global financial crisis.[142] This is the result of the decision of some banks in the United State, Europe, Japan, and other western jurisdictions to restrict their correspondent banking relationship to a few banks, including certain central banks, in developing and emerging economies.[143] This has produced a number of problems in the countries whose banks rely on those relationships. These include jurisdictions in the Caribbean, Middle East and North Africa, Asia-Pacific, and Africa. Among the key problems are the higher cost of, or the actual impossibility of, obtaining trade finance for firms, difficulties in sending remittances, higher costs to perform basic financial transactions, denial of market access, and a general loss of business and investor confidence. The cost of the withdrawal of correspondent banking relationships was large in Latin America, to the point of harming regional financial integration. The IMF reports that reduced access to the payment system for local banks hurt small- and medium-sized firms that could not get access to trade finance for their exports or would otherwise have to pay more for financing.[144]

There are multiple reasons behind the banks' withdrawal decisions. Yet

141. Michaela Erbenová et al., *The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action* 8 (IMF, Staff Discussion Note SDN/16/06, 2016).

142. *Id.* at 6.

143. *Id.* at 9–10.

144. IMF, *Financial Integration in Latin America*, at 32 (Mar. 2016).

results from studies show that regulatory concerns are the key drivers behind those decisions.[145] Since 2012, the Financial Action Task Force's standards on anti-money laundering (AML) and combating the financing of terrorism (CFT) put a greater emphasis on banks' risk assessment decisions with regard to the origin of money and gave banks more responsibility to adopt risk-mitigating approaches.[146] Similarly, the increased international coordination on tax avoidance among OECD countries has shifted a lot of the risks of tax compliance to financial institutions, which are under much greater scrutiny regarding their clients' funds. Banks, faced with increased regulatory risk and compliance costs, have taken a more cautious approach, often deciding to err on the side of caution and terminate correspondent banking with clients or jurisdictions where regulations are unclear, rather than risking fines.[147] For instance, trade finance provides very small margins to banks and needs large volumes to be profitable. If the compliance costs outweigh the profits, then a bank has no option but to drop this line of business.[148]

Moreover, since the global financial crisis, banks have been subject to much higher fines for regulatory violations, often up to billions of U.S. dollars.[149] In the context of payments, violations for AML-CFT regulations, tax avoidance, and international sanctions have become a source of concern for the banks' compliance and risk departments, as the steep regulatory fines can have a detrimental effect on the banks' market position and overall profitability.[150] Since the 1990s, the United Nations, the European Union,

145. *See* World Bank Group [WBG], *Withdrawal From Correspondent Banking: Where, Why, And What To Do About It* (Nov. 2015) (discussing a study with findings that banking authorities and large banks withdrew due to level of risk, regulatory, and business related concerns); KPMG, GLOBAL ANTI-MONEY LAUNDERING SURVEY 2014 36 (2014) (discussing study results showing regulatory considerations was the largest driver behind investment decisions); ECB, *Ninth Survey On Correspondent Banking In Euro* (Feb. 2015) (discussing risk considerations as a possible reason for decline in correspondent banking relationships); Erbenová et al., *supra* note 141, at 19–27 (discussing regulatory obligations and enhanced enforcement as a driver for withdrawal of correspondent banking relationships).

146. *See generally* Financial Action Task Force, *International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation* (2012) (discussing comprehensive measures that countries should implement to combat money laundering and terrorist financing).

147. CENTER FOR GLOBAL DEVELOPMENT, UNINTENDED CONSEQUENCES OF ANTI-MONEY LAUNDERING POLICIES FOR POOR COUNTRIES 12–13 (2015).

148. Staci Warden, *Casualties of War: The Unintended Consequences of America's Financial Weapon of Mass Destruction*, MILIKEN INST. REV. 22, 29 (2015).

149. For instance, in 2014, a U.S. court found BNP Paribas in violation of U.S. law for having bypassed U.S. sanctions on behalf of Cuban, Iranian, and Sudanese clients and was forced to pay 8.9 billion U.S. dollars in forfeitures and fines. *See* Caroline Binham & Jim Pickard, *Value of UK Financial Sanctions Breaches Rises to £1.4bn from £117m*, FIN. TIMES (Feb. 26, 2018), https://www.ft.com/content/97056714-18b8-11e8-9e9c-25c814761640.

150. In 2014, Credit Suisse agreed to pay 2.6 billion U.S. dollars for having helped clients to evade US tax law.

and the United States have increasingly used sanctions to combat the proliferation of nuclear weapons and the financing of terrorism in a number of countries and have shifted most of the burden onto banks who must implement market blockage on the targeted firms. The sanctioning regime not only covers the banks headquartered or operating in the sanctioning jurisdiction, but also extend to all foreign affiliates and clients. In certain cases, the extraterritorial effect of sanctions is such that even banks that are not directly linked to the sanctioning jurisdiction are nonetheless subject to them.[151] Famous in this regard is the extraterritorial application of U.S. tax law, which requires all banks to disclose U.S. clients. Even in those cases, the fear of sanctions has led banks to terminate the correspondent banking with respondent banks in "hot" jurisdictions or that nonetheless would have posed a greater compliance risk.[152]

Exemplary in this regard is the May 2018 decision of the United States to withdraw from the Iran nuclear deal negotiated with the European Union and Russia in 2015.[153] As a consequence of the Iran deal, SWIFT—the world-leading payment provider—will be forced to suspend any dealing with Iranian banks by November 2018.[154] This means that not only will Iranian banks and their operations abroad be prevented from executing their payments through the SWIFT network, but also that, more crucially, all worldwide financial institutions dealing with Iran will be prevented from transferring money towards financial firms. In case of non-compliance, SWIFT would be subject to a barrage of countermeasures which target both the company's board members and the financial institutions that employ them.

E. Central Bank Independence under Threat?

Central bank independence is (almost) unanimously considered a prerequisite for a stable monetary policy. In its broadest sense, it means that the design and implementation of the monetary policy is shielded from political interferences. Instead, the task of setting the interest rate and any other tool normally associated with monetary policy is given to a state agency, usually the central bank, which enjoys statutory guarantees of

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151. *See* ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR (2016) (detailing examples of banks that have been subjected to sanctions with no direct link to the sanctioning jurisdiction). *See also* Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASHINGTON L. REV. 239 (2019) (discussing the financial criminal extraterritoriality doctrine of United States courts).

152. Warden, *supra* note 148, at 28–29.

153. Sam Fleming & Katrina Manson, *Donald Trump Pulls US Out of Iran Nuclear Deal*, FIN. TIMES (May 8, 2018), https://www.ft.com/content/fb369232-52d1-11e8-b3ee-41e0209208ec.

154. Michael Peel & Jim Brunsden, *SWIFT Shows Impact of Iran Dispute on International Business*, FIN. TIMES (June 5, 2018), https://www.ft.com/content/9f082a96-63f4-11e8-90c2-9563a0613e56.

independence from political power.

Many economists have weighed in on the reasons for this peculiar status.[155] Economic theory suggests a direct link between price stability and the credibility of central banks.[156] The political economy of electoral cycles is such that politicians will face incentives to attain short-term political objectives by compromising long-term goals, and the same can be said for any type of government that requires external consensus.[157] In the context of monetary policy, this often entails the printing of money to address unemployment, currency manipulation to boost exports and regain a short-term positive balance of payment, the purchase of government debt, or a government-friendly bank supervisory policy.[158] In this light, insulating the design and implementation of monetary policy from political interferences boosts the credibility of the central bank and is perceived favorably by financial markets as it reduces the risk of myopic policies. Evidence indeed suggests that countries with independent central banks have relatively lower inflation rates and more stable growth.[159] For this reason, the statutes of many central banks in the world now envisage independence as one of the key requisites for an effective monetary policy.[160]

For over three decades, a general consensus formed among policymakers and economists on the benefits of central bank independence.[161] This can be seen by the steady increase in the number of

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155. *See* Alex Cukierman et al., *Measuring the Independence of Central Banks and Its Effect on Policy Outcome*, 6 WORLD BANK ECON. REV. 353 (1992) (discussing the importance of the central bank as an agency that mandates the maintenance of price stability); Vittorio Grilli et al., *Political and Monetary Institutions and Public Financial Policies in the Industrial Countries*, 13 ECON. POL'Y 341 (1991) (discussing study results of central bank independence effects irrespective of political institutions).

156. Robert Barro & David Gordon, *Rules, Discretion, and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101, 102 (1983).

157. Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977).

158. *See* Alberto Alesina, *Macroeconomics and Politics*, in 3 NBER MACROECONOMIC ANN. 13 (Stanley Fischer ed., 1988) (discussing how central bank independence affects political influence on economy and monetary policy).

159. *See* Alberto Alesina & Lawrence Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY CREDIT & BANKING 151 (1993) (discussing study results that showed monetary discipline associated with central bank independence resulted in lower inflation).

160. For recent surveys, see Ana C. Garriga, *Central Bank Independence in the World: A New Data Set*, 42 INT'L INTERACTIONS 849 (2016) (discussing a study of multiple countries and statutory reforms affecting central bank independence); Ashraf Khan, *Central Bank Legal Frameworks In The Aftermath Of The Global Financial Crisis* (IMF, Working Paper No. 17/101, 2017) (discussing changes to central bank laws after the global financial crisis).

161. Christopher Crowe & Ellen E. Meade, *Central Bank Independence and Transparency: Evolution and Effectiveness* 4 (IMF, Working Paper No. 08/119, 2008) (arguing that the acceptance of central bank independence has increased since it began being seriously measured in the 1980s).

countries that have changed the statutes of their central bank or their domestic laws to guarantee independence.[162] Yet in the last few years and in many parts of the world, we have witnessed attacks on the legitimacy of central bankers' monetary policy decisions or explicit attempts to reduce or eliminate their independence.

In the United States, Donald Trump constantly attacked the Federal Reserve for its interest rate decisions.[163] In the European Union, the European Central Bank has been under fire from all sides of the populist spectrum—from Italy and Greece to Germany and Austria—over its monetary policy tightening or its decisions to finance defaulting countries during the sovereign debt crisis.[164] In the United Kingdom, Brexiteers have constantly criticized the Bank of England for its allegedly "scaremongering" tactics and biased forecasts on the Brexit economic scenario.[165] In Hungary, Victor Orbán has, more than any other western leader, placed financial nationalism and the undermining of the National Bank of Hungary's independence at the center of his populist economic agenda.[166] Attacks on central bank independence are not exclusive to western democracies. In India, Prime Minister Narendra Modi has tried to invoke a small clause on the Reserve Bank of India's statute allowing the government to provide direction, "when necessary in the public interest," to get exemptions for power companies and to influence credit growth in the economy.[167] In Turkey, President Recep Tayipp Erdogan, a long-term skeptic of the standard interest rates policy, clashed openly with the Turkish Central Bank for not helping the Turkish economy in the wake of the emerging market monetary crisis that hit Turkey in the summer of 2018.[168]

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162. Garriga, *supra* note 160; Khan, *supra* note 160.

163. Peter Wells, *Trump Describes FED as His "Biggest Threat*,*"* FIN. TIMES (Oct. 16, 2018), https://www.ft.com/content/798bbcae-d19c-11e8-a9f2-7574db66bcd5.

164. Claire Jones, *Draghi Launches Defence of Central Banks Over Political Heat*, FIN. TIMES (Oct. 26, 2018), https://www.ft.com/content/ddc8aabe-d92c-11e8-a854-33d6f82e62f8.

165. Joe Murphy & Nicholas Cecyl, *Boris Johnson Clashes with Bank of England Chief Over Whether Britain Can Strike a Deal to Continue Free Trade with EU After Brexit*, EVENING STANDARD (June 25, 2019), https://www.standard.co.uk/news/politics/boris-johnson-clashes-with-bank-of-england-chief-over-whether-britain-can-strike-a-deal-to-continue-a4175296.html; Katie Weston, *Former Farage Advisor Attacks Mark Carney for Scaremongering the Public*, EXPRESS (Sept. 14, 2018), https://www.express.co.uk/news/uk/1017633/bank-of-england-governor-mark-carney-house-prices-brexit-no-deal-brexit-brexit-news.

166. Johnson & Barnes, *supra* note 31, at 547–49.

167. Devesh Kapur, *The Battle between India's Central Bank and the Government Has Deep Roots*, FIN. TIMES (Nov. 4, 2018), https://www.ft.com/content/d50a1150-debe-11e8-b173-ebef6ab1374a.

168. Onur Ant, *Erdogan Says that His Patience on Central Bank Policy Has Limits*, BLOOMBERG NEWS (Sept. 14, 2018), https://www.bloomberg.com/news/articles/2018-09-14/erdogan-says-his-patience-on-central-bank-policy-has-limits.

V. WHAT LIES BEHIND FINANCIAL NATIONALISM?

The previous section showed that financial nationalism is indeed rising, albeit in disguise and in different forms. The objective of this section is to analyze, from a theoretical perspective, the possible explanations for this phenomenon. To do so, I will first introduce the main approaches of the analysis of financial nationalism, and then discuss how they could be applied to recent trends.

A. Theoretical Approaches to Financial Nationalism

Unlike international trade theory, there is no general economic model of international finance that considers the domestic distributional effects of financial protectionism and its welfare costs.[169] Moreover, given the different forms and regulatory strategies used in financial nationalism, it would be nearly impossible to group them together under a single comprehensive theory. Yet economists and political scientists have usually adapted trade theories and political economic models to account for the specificities of finance. In this section, I will discuss two main approaches: the economics of international finance and the political economy of regulatory cooperation.

1. Economics of Financial Globalization

The starting point for any discussion on financial globalization must be the Heckscher-Ohlin-Samuelson theorem. The fundamental postulate of this model is that a country will export the commodity that relies on the use of abundant and cheap factors of production and import those commodities that require the use of expensive and scarce factors.[170] In this context, financial globalization will primarily benefit those countries that have a strong financial sector such as the United States, Japan, or the European Union. Indeed, banks will be able to export their services abroad and exploit economies of scale and scope. Yet analyzing international finance from a pure trade perspective is limiting, as it does not consider the effects of international finance from the import or capital inflow side.

The literature on financial globalization is mixed as to whether financial liberalization is a blessing or a curse. The standard economics account of financial globalization argues that, in principle, international capital flows bring positive effects to the domestic economy. The neoclassical growth model of an international economy predicts that capital will flow where

169. Edmund J. Malesky, *Interest Group Politics*, *in* HANDBOOK OF SAFEGUARDING GLOBAL FINANCIAL (Gerard Caprio, Jr. et al. eds., 2013) (stating the three theories currently underpinning "existing political economic theory").

170. DOMINICK SALVATORE, INTRODUCTION TO INTERNATIONAL ECONOMICS 83 (1st ed. 2004).

interest rates are higher.[171] Financial openness allows a more efficient allocation of capital, thus reducing the cost of capital for firms and individuals and increasing productivity. Firms will be able to exploit interest rate differentials and access a wider variety of products – for instance, by issuing securities in a foreign exchange. For the same reason, a number of studies have associated open financial systems with increased growth, especially in developing economies.[172] Moreover, financial liberalization brings the usual effects associated with free trade and competition.[173] Financial firms will specialize according to their comparative advantage and offer a better service tailored to the needs of customers. Increased pressure from incumbent firms will reduce rent-seeking activities and drive inefficient firms out of the market. International investment will induce technology and skills transfers, especially when large and sophisticated global banks or investment firms operate through permanent establishments.

These theories, however, cannot explain why regulators sometimes decide to maintain or return to a closer capital account. There is a large amount of literature that associates financial openness with economic and financial crisis. As Jagdish Bhagwati famously said, "trading in widget and trading in dollars is not the same."[174] There is unequivocal evidence that premature capital account opening without a robust macroeconomic framework can exacerbate risks and lead to monetary crash.[175] Indeed, in their canonical book on sovereign debt crises, Carmen Reinhart and Kenneth Rogoff show that waves of financial globalization almost always coincide with widespread banking crises.[176] Without strong financial supervisory and

171. *See* DARON ACEMOGLU, INTRODUCTION TO MODERN ECONOMIC GROWTH 26–76 (2009) (discussing the solow growth model).

172. *See generally* R.G. King & Ross Levine, *Finance and Growth: Schumpeter Might be Right*, 108 Q.J. ECON. 717 (1993) (discussing study of eighty countries with evidence of the financial system promoting economic growth); Ross Levine, *Financial Development and Economic Growth: Views and Agenda*, 35 J. ECON. LITERATURE 688 (1997) (discussing evidence that showed a functioning financial system led to economic growth); Laura Alfaro et al., *Foreign Bank Entry and Entrepreneurship* (Columbia Univ., Working Paper, 2015) (discussing study of forty-six countries and thirty-six industries with evidence of foreign bank presence fostering business formation).

173. For an overview, see MASAMICHI KONO ET AL., OPENING MARKETS IN FINANCIAL SERVICES AND THE ROLE OF THE GATS 17–23 (1998) (explaining that liberalization has led to increased competition forcing companies to seek cheaper ways to finance activities); WBG, *Global Financial Development Report 2017/2018: Bankers Without Borders*, at 21–25 (2018), https://openknowledge.worldbank.org/bitstream/handle/10986/28482/9781464811487.pdf (discussing the risks of openness of international banking).

174. Bhagwati, *supra* note 67.

175. For an overview, see KONO ET AL., *supra* note 173, at 23–26 (1998); COMM. ON INT'L ECON. POL'Y AND REFORM, BANKS AND CROSS-BORDER CAPITAL FLOWS: POLICY CHALLENGES AND REGULATORY RESPONSES (2012) (explaining the unintended consequences of capital account liberalization that result from the procyclicality in capital flows going unaddressed).

176. REINHART & ROGOFF, *supra* note 46, at 157.

regulatory frameworks, domestic financial systems can similarly be under stress and unable to manage the stability of the local financial system. For instance, experience shows that small and underdeveloped financial systems have difficulty coping with cross-border banking crises, as they lack the supervisory and financial resources to deal with a bank in distress. More recent studies have also challenged the liberalization-growth nexus, questioning the entire foundation of financial globalization for development.[177] Moreover, there is a new wealth of evidence showing a direct correlation between financial globalization and inequality, albeit the precise reasons are still unclear.[178]

Financial nationalism can be explained by the desire of regulators to protect themselves against the dangers of international finance, whenever the risks of globalization seem to outweigh its benefits. For instance, most of the episodes of capital controls since the 1997 South Asian financial crisis can be explained by the need to protect monetary and financial stability.[179] Capital controls have passed through various phases of acceptance and rejection by the academic and policy communities.[180] As of today, they are tepidly accepted by the international financial community when necessary to curb sudden capital inflows under specific macroeconomic circumstances. On the contrary, controls on the outflow of capital are still seen as the last resort to tame a pending crisis and are openly rejected as bad policies under all other circumstances.[181] Similarly, ring-fencing, another form of capital control, is sometimes justified by the need of regulators to prevent assets redistributions within the consolidated banking group that affect the financial

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177. *See* Barry Eichengreen, *Capital Account Liberalization: What Do the Cross-Country Studies Tell Us?*, 15 WORLD BANK ECON. REV. 341 (2001) (discussing the controversy of capital account liberalization through theoretical perspectives and lack of conclusive empirical analysis); Ayhan Kose et al., *Financial Globalization: A Reappraisal*, 56 IMF STAFF PAPERS 8 (2009) (analyzing the effects of capital account liberalization and noting the lack of robust evidence of growth benefits); Eswar Prasad et al., *Effects of Financial Globalization on Developing Countries: Some Empirical Evidence* 23–37 (IMF, Occasional Paper No. 220, 2003) (discussing theoretical and observed effects of financial globalization and economic growth).

178. For an overview, see Florence F. Jaumotte et al., *Rising Income Inequality: Technology, Or Trade and Financial Globalization?*, 61 IMF ECON. REV. 271 (2013); Rodrik, *Populism and the Economics of Globalization, supra* note 2; Davide Furceri et al., *The Aggregate and Distributional Effects of Financial Globalization: Evidence from Macro and Sectoral Data* (IMF, Working Paper No. 18/83, 2018); Davide Furceri & Prakash Loungani, *Capital Account Liberalization and Inequality* (IMF, Working Paper No.15/243, 2015).

179. *See* Monetary and Capital Markets Dep't et al., *Liberalizing Capital Flows and Managing Outflows* 27, 33–34, 37–38 (Mar. 13, 2012) (discussing examples of use of capital controls since 1997).

180. *See generally* Ghosh & Qureshi, *supra* note 50 (discussing the history of the use of capital controls).

181. *See, e.g.*, IMF, *The Liberalization and Management of Capital Flows: An Institutional View* 25–26, 36 (2012) (recommending that the Directors of the IMF endorse such a view as the IMF's institutional view).

stability of the local foreign affiliate.[182]

2. Interest Group Theories

Neoclassical economics provided a fertile ground for a set of political economy theories, including explaining the role of political and economic actors in the process of financial liberalization. Formal economic models of domestic policies started to develop as a mainstream discipline with Kenneth Arrow's "impossibility theorem" in the 1950s.[183] This branch uses neoclassical economics to explain how different social preferences lead to specific political decisions.[184] Within the area of social choice theory, interest group theories use a rationalist approach to discern which domestic and foreign lobby groups will push for, or resist, a specific political process.[185]

In the field of international economics, interest group theories were first used to explain trade preferences.[186] Towards the early 1990s, interest group theories were adopted in international finance.[187] Ronald Rogowski argued that the decision to open domestic financial markets in the 1970s was due to two combining factors.[188] First, the need of domestic industries to access cheaper sources of capital, which led them to lobby their own governments to loosen the restrictions on the controls of capital flows, thus paving the way for the subsequent waves of financial integration. Secondly, rising incomes and increased savings changed the median voter's preference towards lower inflation and increased availability of investment opportunities.[189] According to this account, governments will liberalize the financial sector as long as the political power of interest groups favoring globalization is higher than that of opposing interest groups. This explains why the United States and the

182. D'Hulster & Otker-Robe, *supra* note 119, at 4.

183. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951) (setting out the "impossibility theorem").

184. *See generally* ALLAN M. FELDMAN & ROBERTO SERRANO, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY (2d ed. 2006) (focusing on welfare economics and social choice theory); WULF GAERTNER, A PRIMER IN SOCIAL CHOICE THEORY (2006) (introducing social choice theory).

185. *See* KOTARO SUZUMARA, RATIONAL CHOICE, COLLECTIVE DECISIONS, AND SOCIAL WELFARE 1–6 (1983) (introducing the author's rationalization theory).

186. *See* EDWARD MANSFIELD & HELEN V. MILNER, VOTES, VETOES, AND THE POLITICAL ECONOMY OF INTERNATIONAL TRADE AGREEMENTS 37 (2012) (discussing early interest group theories). *See generally* RONALD ROGOWSKI, COMMERCE AND COALITIONS (1989) (comparing the effects of interest groups in different countries on trade preferences).

187. *See generally* Jeffry A. Frieden, *Invested Interests: The Politics of National Economic Policies in a World of Global Finance*, 45 INT'L ORG. 425, 442–51 (1991) (discussing how interest group activity would likely change).

188. ROGOWSKI, *supra* note 186.

189. Andrew Walter, *Understanding Financial Globalization in International Political Economy*, *in* GLOBALIZING INTERNATIONAL POLITICAL ECONOMY 141, 156 (Nicola Philips ed., 2005).

United Kingdom started to liberalize earlier in the 1970s, and why Latin American and Asian countries liberalized later due to their need to attract more foreign direct investments.

The same theories also explain how the increased economic influence of the financial sector in the 1980s led to huge lobbying pressure by banking conglomerates on OECD countries to actively promote the dismantling of the remaining barriers of financial integration. Banks in the United States, United Kingdom, and continental Europe started to feel the need to expand their reach across borders to increase economies of scale and increase profits. Notwithstanding their desire to expand, they still faced considerable administrative and regulatory barriers in a number of countries, as local financial institutions—sometimes under the financial controls of the government—had the lion's share of the domestic market. This led to a clash between export-oriented financial firms supported by capital-intensive industries requiring cheaper funding and local domestic-oriented firms suffering from foreign competition. In this situation, unilateral liberalization was not feasible. For this reason, the process of financial liberalization had to rely on an international regulatory platform—the WTO GATS—to facilitate the economic bargain between domestic and exporting financial industries of WTO members.[190]

A number of scholars have applied interest group theory to the issue of international regulatory and policy cooperation in finance.[191] In his work on the Basel Capital Accord, David Singer argues that regulators face a double pressure when agreeing to international regulatory standards.[192] Regulators need to strike a balance between maintaining the competitiveness of domestic firms while guaranteeing the safety of the financial system. In an open global financial market, regulatory unilateralism does not work, as the optimal domestic regulatory win-set might mean loss of market share against less regulated firms. In this situation, the only option is to strike a deal among national regulators that guarantees a level playing field among countries. This is precisely what occurred during the 1980s, when U.S. and U.K. regulators suffering from competition of less-regulated Japanese banks decided to push for a global standard on capital adequacy for banks.[193]

190. *See* WENDY DOBSON & PIERRE JACQUET, FINANCIAL SERVICES LIBERALIZATION IN THE WTO 95–101 (1998) (discussing the role of GATS and the WTO in promoting financial liberalization).

191. *See*, *e.g.*, Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001) (focusing on harmonization processes); Andrew Walter, *Adopting International Financial Standards in Asia: Convergence or Divergence in the Global Political Economy?*, *in* GLOBAL FINANCIAL INTEGRATION THIRTY YEARS ON 95 (Geoffret Undergill et al. eds., 2010) (focusing on the case study of Asia).

192. SINGER, *supra* note 7, at 22.

193. *Id.* at 49–62.

Stavros Gadinis provides a political economy framework to understand when coordination works. He argues that, in an open global financial market, coordination depends on the strength and weakness of countries as dominant or weak financial centers. Whether coordination works depends on the willingness of market players to access a given foreign market, the strength of the dominant center, and the willingness of states to compromise on regulatory freedom in order to get market access abroad.[194]

Other authors have provided political economy models that explain coordination problems in cross-border banking supervision and resolution.[195] The main theory is that cross-border banking is affected by principal-agent problems that prevent national supervisory agencies from cooperating whenever it is not in the national interest. This occurs at any stage of the supervisory process, from the refusal of supervisors to share supervisory data due to the fear of immediate reactions from the foreign counterpart to the moment of declaration of insolvency.[196] Federico Lupo-Pasini extends this model to the resolution phase, showing that the same conflict of incentives often prevents resolution authorities from adopting a globally-optimal resolution strategy whenever the costs of cooperation outweigh the benefits in terms of fiscal expenditure or creditor protection.[197]

In his political economy model of capital controls, Gunter Schulze theorizes that capital controls on the outflow of capital—more precisely, a tax on capital exports—benefit those who have less capital, namely, labor-intensive industries and workers. In a democracy, capital controls will be

194. *See* Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L.J. 447, 503 (2008) (discussing an example in which the United States strongly dominates a market).

195. *See*, *e.g.*, CROSS-BORDER BANKING: REGULATORY CHALLENGES (Gerard Caprio, Jr. et al. eds., 2006) (compiling various experts and regulators' models); CLAESSENS ET AL., *supra* note 79 (arguing for a modified universal, not territorial, approach); INTERNATIONAL FINANCIAL INSTABILITY: GLOBAL BANKING AND NATIONAL REGULATION (Douglas D. Evanoff et al. eds., 2007) (including discussion of cross-border contagion links, currency crises, and hedge funds); SCHOENMAKER, *supra* note 78, at 115–29 (discussing the political economy of international governance); Kathia D'Hulster, *Cross Border Banking Supervision: Incentive Conflicts in Supervisory Information Sharing between Home and Host Supervisors* (World Bank, Policy Research Working Paper 5871, 2011) (focusing on obstacles to supervisory information sharing between countries).

196. Piotr Bednarski & Grzegorz Bielicki, *Home and Host Supervisors' Relations from a Host Supervisor's Perspective*, *in* CROSS-BORDER BANKING: REGULATORY CHALLENGES 211 (Gerard Caprio, Jr. et al. eds., 2006) (discussing sovereignty and jurisdictional issues); Eric Rosengren, *An Overview of Cross-Border Bank Policy Issues*, *in* CROSS-BORDER BANKING: REGULATORY CHALLENGES 465 (Gerard Caprio, Jr. et al. eds., 2006) (regarding reactions to solvency issues); Richard J. Herring, *Conflicts Between Home & Host Country Prudential Supervisors* 10–14 (Wharton Fin. Inst. Ctr, Wharton Sch., U. of Pa., Working Paper, 2007); Martin Schüler, *Incentive Problems in Banking Supervision: The European Case* (Ctr. for Eur. Econ. Res., Discussion Paper No. 03-62, 2003) (focusing on Europe).

197. LUPO-PASINI, *supra* note 6, at 90–118; *see also* SCHOENMAKER, *supra* note 78.

implemented if the median voter has a relatively low capital-to-labor ratio.[198] The likelihood of capital controls on the outflow is increased in a situation of high unemployment to preserve national income, as capital outflows are considered to aggravate unemployment.[199] In a different set of models (this time focused on inflows), various scholars argue that capital controls in the forms of small Pigouvian taxes on the inflow of capital are optimal when adopted for prudential reasons. The argument is that, since international investors do not internalize the externalities of their portfolio investments in terms of rising domestic inflation, bubbles, or short-term vision, taxes on the inflow of capital would force them to bear the costs of their investment for the domestic economy.[200]

B. Analysis of the Current Nationalistic Trend

In light of the above, what could possibly explain the rise of nationalism in finance? Based on these assumptions, the sections below sketch a basic analysis of the reasons behind this trend. There are five model scenarios: 1) regulatory unilateralism, 2) ring-fencing, 3) extraterritoriality, 4) digital protectionism, and 5) central bank independence.

1. Regulatory Unilateralism

The literature on regulatory coordination in finance stresses that national regulators do have an interest in cooperating on financial standards. Regulatory differences constitute barriers to trade for exporting firms and, therefore, imply lost revenues. In addition, capital-intensive industries, as well as domestic investors, need to tap into global markets for cheaper sources of capital. Hence, from a coordination viewpoint, the difficulty lies in finding a common ground, rather than in enforcing compliance.[201]

In a closed economy, regulators will set their regulatory perimeter of intervention in a limited zone of acceptance. This will be determined by the political tradeoff between the needs of different interest groups. The literature on capital adequacy standards suggests that domestic banks will favor low regulatory capital to maximize returns, while depositors will favor the opposite to minimize risks of instability.[202] Depending on the relative

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198. *See generally* GUNTHER G. SCHULZE, THE POLITICAL ECONOMY OF CAPITAL CONTROLS (2000) (discussing government incentives for imposing restrictions on international capital movements).

199. *Id.*

200. *See generally* OLIVIER JEANNE ET. AL, WHO NEEDS TO OPEN THE CAPITAL ACCOUNT? (2012) (discussing the development of open capital accounts); IMF, *Capital Inflows: The Role of Controls* 9 (IMF, Staff Position Note SPN/10/04, 2010) (discussing the impact of taxes on capital flows).

201. *See generally* LUPO-PASINI, *supra* note 6 (discussing the successes and failures of various international law regimes in protecting financial sovereignty).

202. SINGER, *supra* note 7, at 53–56.

political weight of those groups, regulators will choose a regulatory standard somewhere in between. In an open economy, however, two additional interest groups play a role. First, domestic banks with global ambitions will need the support of their government to access foreign markets and they will favor policies that reduce barriers to investment. Second, domestic investors or capital-intensive industries will push for policies that attract foreign banks, as this will reduce their costs of credit. Since capital is mobile in an open economy, regulators will have to find a win-set that is neither too high to discourage international investors, nor too low to put financial stability in jeopardy. As Andrew Singer convincingly argues, when regulators are under pressure from less-regulated foreign firms, they will push for international regulatory harmonization.[203]

What explains a return of regulatory unilateralism then? At the outset, regulatory unilateralism plays a role only in key financial centers such as the United States and the European Union, which are rule-makers rather than rule-takers. There is ample literature demonstrating that except for members of the Basel Committee on Banking Supervision, countries are constrained by their supervisory capacity in adopting more stringent regulations.[204] One possible explanation is that the relative power of globally active banks (or their appetite for expansion) is reduced while, at the same time, big financial centers have enough market size to satisfy the needs of domestic capital-intensive industries. The decreased level of political support for regulatory convergence pushes the regulatory win-set closer to what it would have been in a situation of domestic equilibrium. In this case, it is interesting to see that we are not witnessing a race to the bottom, but rather a retrenchment towards closed economy. Capital-intensive industries and savers will be the interest group losing out from this situation, as they will experience higher costs of financing.

2. Ring-Fencing

Cross-border banking presents very different coordination problems from regulatory standards. The literature on cross-border banking crises shows that, while the institutional mechanisms of coordination (mostly through Memoranda of Understanding or Colleges of Supervisors) are, in principle, easy to set up, implementation is the problem. In the event of a crisis, domestic pressure mounts on supervisors not to cooperate with their foreign counterparts. To avoid capital flights, supervisors will forbear sharing data on the local bank with foreign supervisors. During resolution,

203. *See generally id.* (providing a survey of regulators' reactions to pressures).

204. Emily Jones & Alexandra Zeitz, *The Limits of Globalizing Basel Banking Standards*, 3 J. FIN. REG. 89, 105–11 (2017).

supervisors will try to maximize domestic interest by ring-fencing assets or by refusing to fund the resolution of the foreign bank.[205]

Why do bank supervisors enter into agreements that they are unable to implement under stress? One explanation is that the interest groups that are vocal in setting up cooperation mechanisms—globally active banks—are the same that lobby for protection at the very first sign of crisis. In addition, lobby groups that were absent in the negotiation stage, depositors and domestic investors, will be extremely vocal in requesting protection. This changes considerably the payoffs for resolution authorities as they will be subject to intense pressure.

One of the key lessons from the global financial crises was that controlling the stability of a cross-border bank in its consolidated structure is impossible, unless the home and host supervisors attain the maximum level of cooperation. Experience demonstrates that this is almost impossible to achieve in reality, as the politics of finance will inevitably intrude and push for the protection of national interests.[206] As theorized by Dirk Schoenmaker in his financial trilemma, states that want to maintain a stable financial system have to choose between either: 1) giving up financial sovereignty by transferring supervisory powers over international banks to an international supervisory authority or 2) giving up the benefits of international banking by adopting a national supervisory and regulatory framework that limits capital mobility within the banking group.[207] Geographical ring-fencing is precisely the latter option.

Since the crisis, we have witnessed that geographical ring-fencing is used not as a crisis measure, but rather as a permanent feature of the local supervisory system. Subsidiarization changes the landscape of global finance, as it reduces considerably capital mobility. From a political economy perspective, moving towards a host-country model shows that the political costs of coordination are factored into the actual supervisory model. Thus, the voices of taxpayers and all other groups against supervisory coordination are well-factored into the mode of financial liberalization—branch versus subsidiaries—and predominant over that of capital-intensive industries. Also, cross-border banks now seem to favor a subsidiary model, as it prevents them from suffering intra-group spillovers during a crisis.

3. Extraterritoriality

The vast political science and international political economy literature

205. SCHOENMAKER, *supra* note 78, at 27–33.

206. *See generally* LUPO-PASINI, *supra* note 6 (discussing the successes and failures of various international law regimes in protecting financial sovereignty).

207. SCHOENMAKER, *supra* note 78, at 18–32.

on regulatory competition clearly show that "market power," or "market dominance," is a fundamental driver of regulatory outcomes.[208] Extraterritoriality is one of the key expressions of such market power. By expanding the scope of national jurisdiction to entities or deals that are geographically situated in a different territory, regulators expand their reach across national borders. Of course, because regulatory jurisdiction is different than judicial jurisdiction, the violation of the extraterritorial rule can be sanctioned—and, thus, is credible—only if the violating entity has presence in the jurisdiction or if it wished to access it in the future. In the first case, sanctions will target the offices of the company, individuals linked to the company, or assets belonging to the company. In the second case, the threat of market access denial would be worrying enough to force compliance. The practice of using extraterritoriality as a regulatory strategy has the effect of forcing companies to comply with an additional set of rules that they would normally not be subjected to given their location. When compliance with the extraterritorial rules is particularly costly or in conflict with home rules, firms might have to choose between two competing markets.[209] This is what happened, for instance, in the four years' war on the regulation of OTC derivatives and central clearinghouses between the United States and the European Union.[210]

Since the credibility of the threat is linked to the market power of the state, only dominant markets can engage in extraterritoriality. From an economic viewpoint, they behave like a firm in a situation of monopolistic competition or monopsony. Like a single seller or buyer in a market, states enjoying a position of market dominance can impose on foreign entities their decisions, knowing that there are no other options for their clients than taking them. From a political economy viewpoint, in dominant markets, the regulatory domestic and foreign win-sets are the same. Indeed, unlike other scenarios discussed in this paper, the domestic political economy equilibrium is not later affected by external market dynamics, such as threat of market loss in third countries or reduced capital inflow. In a dominant market, globally active banks will not lose market access abroad, and foreign investors will have the same interest in moving into the country as before,

208. *See generally* Nikhil Kalyanpur & Abraham L. Newman, *Mobilizing Market Power: Jurisdictional Expansion as Economic Statecraft*, 73 INT'L ORG. (2018) (arguing that a states' ability to protect its domestic firms is affected both by its economic strength and the strength of its political institutions); Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001) (discussing the need for political pressure from dominant financial centers for market regulation); Gadinis, *supra* note 194 (discussing an example in which the United States strongly dominates a market).

209. LUPO-PASINI, *supra* note 6, at 163–66.

210. *Id.*

since the appeal of the market is unchanged. Thus, the raising or lowering of the regulatory perimeter at the domestic level is purely driven by domestic considerations. In the case of AML regulations, the United States benefits from a position of almost total control as the dominance of the U.S. dollar as a global reserve currency means that any deal involving U.S. dollars must go through U.S. banks at some point. In turn, any bank that wants to deal with international clients will have to establish a foot in the United States, either by establishing a branch or subsidiary, or by engaging a U.S. bank as its correspondent.

4. Digital Protectionism

Financial nationalism in FinTech manifests itself mainly in two ways. On the one hand, countries are increasingly engaged in a race to the bottom in regulatory and licensing policies to attract as many FinTech firms as possible.[211] On the other hand, countries impose controls on the flow of data that act as import or export barriers. From a political economy viewpoint, it is difficult to reconcile the two approaches, as they often conflict with each other. Indeed, while tax exemptions or sandboxes act as domestic and export subsidies, thus lowering the cost of services, controls on the flow of data increase the cost of production, as firms are required to operate as independent companies from a data perspective.

One way to reconcile these two opposite policies is to see them as two facets of an infant industry policy. In trade policy, the infant industry argument was used to justify protection to nascent industries against the threat coming from foreign competition. Import restrictions make foreign goods or services more expensive. This serves to give breathing space to otherwise uncompetitive local domestic industries that can now grow to a size where economies of scale would make them competitive. Like for all forms of trade protectionism, the infant industry argument is mostly contested by economists, as it produces heavy distortions.[212] The rising costs of goods or services translates to a deadweight loss for the nation, and often results in rent-seeking. On the other hand, other studies suggest that when certain preconditions are met—namely, the presence of dynamic learning effects external to firms, and the use of subsidies over tariffs or quotas—infant-industry protection might be less disruptive than usually

211. Jemima Kelly, *A "FinTech Sandbox" Might Sound Like a Harmless Idea. It's Not*, FIN. TIMES (Dec. 5, 2018), https://ftalphaville.ft.com/2018/12/05/1543986004000/A—fintech-sandbox—might-sound-like-a-harmless-idea—It-s-not/.

212. Robert E. Baldwin, *The Case Against Infant-Industry Tariff Protection*, 77 J. POL. ECON. 295, 304 (1969).

considered.[213]

5. Central Bank Independence

There is an emerging literature on populism and central bank independence. A few authors have suggested a relationship between the growing populist attacks against technocratic elites or experts and central banks.[214] Indeed, given the statutory requirement of technical expertise for central bank officers, at least at the Board level, and the obligation to set the monetary policy to attain specific macroeconomic goals but not others, most central bankers could be easily considered specialized technocrats. It is probably true that, on a more general level, pressure has arisen on agencies to conform more with the populist governments. We can see this regarding environmental policy where the trade-off between industry's goals and environmental protection is under constant battle.[215]

The technocratic anger argument, nevertheless, has the merit of highlighting what is probably the central problem with monetary policy and populism: the increased pressure on fiscal policy to stimulate growth and the effect on monetary stability. Since the global financial crisis, central banks have had to intervene with emergency measures to maintain the stability of the financial sector, and in the Eurozone area, central banks had to bailout defaulting states. Both the bailout of financial institutions in the United States and Europe and the debt restructuring interventions required for Greece, Ireland, Spain, and Portugal had major fiscal and distributional implications. At the domestic level, taxpayers' money had to be sacrificed to bailout insolvent banks, sparking a backlash against the financial sector, exemplified by the "Occupy Wall Street" movement in the United States. At the Eurozone level, where the very opposite problem occurred, the absence of fiscal solidarity prevented a timely resolution of the sovereign debt crisis, thus leading to a revolt against European institutions by southern European states.[216]

The need for central banks to adopt unconventional monetary policies to address low inflation and the augmented scope of central bank

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213. Marc J. Melitz, *When and How Should Infant Industries Be Protected?*, 66 J. INT'L ECON. L. 177, 178 (2005).

214. WILLEM BUITER, DYSFUNCTIONAL CENTRAL BANKING: THE END OF INDEPENDENT CENTRAL BANKS OR A RETURN TO 'NARROW CENTRAL BANKING' – OR BOTH? (2016).

215. In the United States, President Trump has openly challenged the U.S. Environmental Protection Agency on its stance on climate change.

216. *See generally* Federico Lupo-Pasini, *Economic Stability and Economic Governance in the Euro Area: What the European Crisis Can Teach on the Limits of Economic Integration*, 16 J. INT'L ECON. L. 211 *passim* (2013) (discussing the difficulty of using international law to maintain economic stability in light of the recent European economic crisis).

interventions with macro-prudential tools also contributed greatly to the clash with governments.[217] Both quantitative easing and macroprudential policy have fundamental distributional implications; the latter because it influences directly, and more than any other previous tool, the price of houses and corporate assets[218] and the former because in a situation of economic integration, such as in the European Union, de facto is interpreted as a promise to buy the sovereign debt of individual member states.[219] Charles Goodhart and Rosa Lastra have recently argued that tensions between populist governments and central banks will only increase over time.[220] While the latter will focus on their statutory goal of price stability, politicians will try to pressure for faster growth.[221]

VI. CONCLUSIONS

After a period of almost forty years of progressive cooperation in financial regulation, we are now potentially entering a new phase of relative disengagement in international financial relations. The slowdown in the pace and level of financial integration since 2008, the global systemic risks inherent in the life of global systematically important banks, the rise of populist and nationalist parties in many countries, and a looming economic war for technological supremacy between China and the United States have all contributed to a change in the appetite for cooperation. This Article has discussed some of the recent phenomena of financial nationalism around the world, from the regulatory conflicts around Brexit between the European Union and the United Kingdom to the open distrust against the Chinese FinTech giants' expansion by Western regulators. It is too early to judge whether these episodes constitute a clear change in international financial policymaking that will remain with us for the foreseeable future or mere epiphenomena of contingent political and economic scenarios. The history of finance has showed that global markets do need global rules, even if they

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217. Jakob de Haan et al., *Central Bank Independence Before and After the Crisis*, 60 COMP. ECON. STUD. 183, 192–200 (2018).

218. Fernández-Albertos, *The Politics of Central Bank Independence*, 18 ANN. REV. POL. SCI. 217, 232 (2015) (concluding that the actions taken by any independent central banks are inescapably distributive); *see also* de Haan et al., *supra* note 217, at 195 (stating that "macro-prudential and unconventional monetary policies" have distributional consequences and explaining how this would work in the real estate sector).

219. James Bullard, *Central View: The Global Battle Over Central Bank Independence*, FED. RESERVE BANK ST. LOUIS (2013), https://www.stlouisfed.org/publications/central-banker/spring-from-the-president/speeches-and-presentations/2013/the-global-battle-over-central-bank-independence; *see also* Goodhart & Lastra, *supra* note 3, at 52 (discussing quantitative easing in the context of globalization).

220. Goodhart & Lastra, *supra* note 3, at 51.

221. *Id.*

fall short of the complex and binding framework found in other fields of economic relations. Unless politicians around the world will fully turn their back to the promise of global finance, which seems unlikely, a minimum level of cooperation will always remain. Yet, in the last century, we have witnessed too many times how the populist rhetoric against financial markets and distrust against foreigners can quickly escalate to full economic chaos. Hopefully, this Article will contribute to avoiding it.